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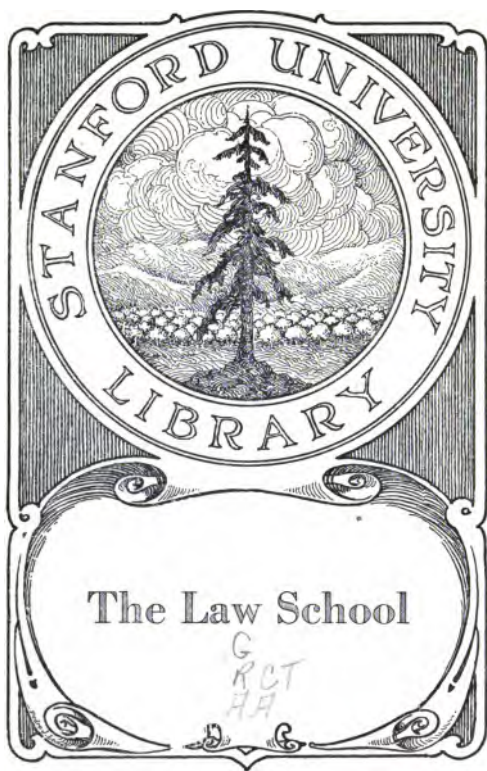
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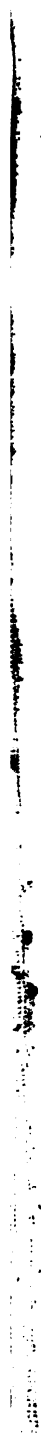
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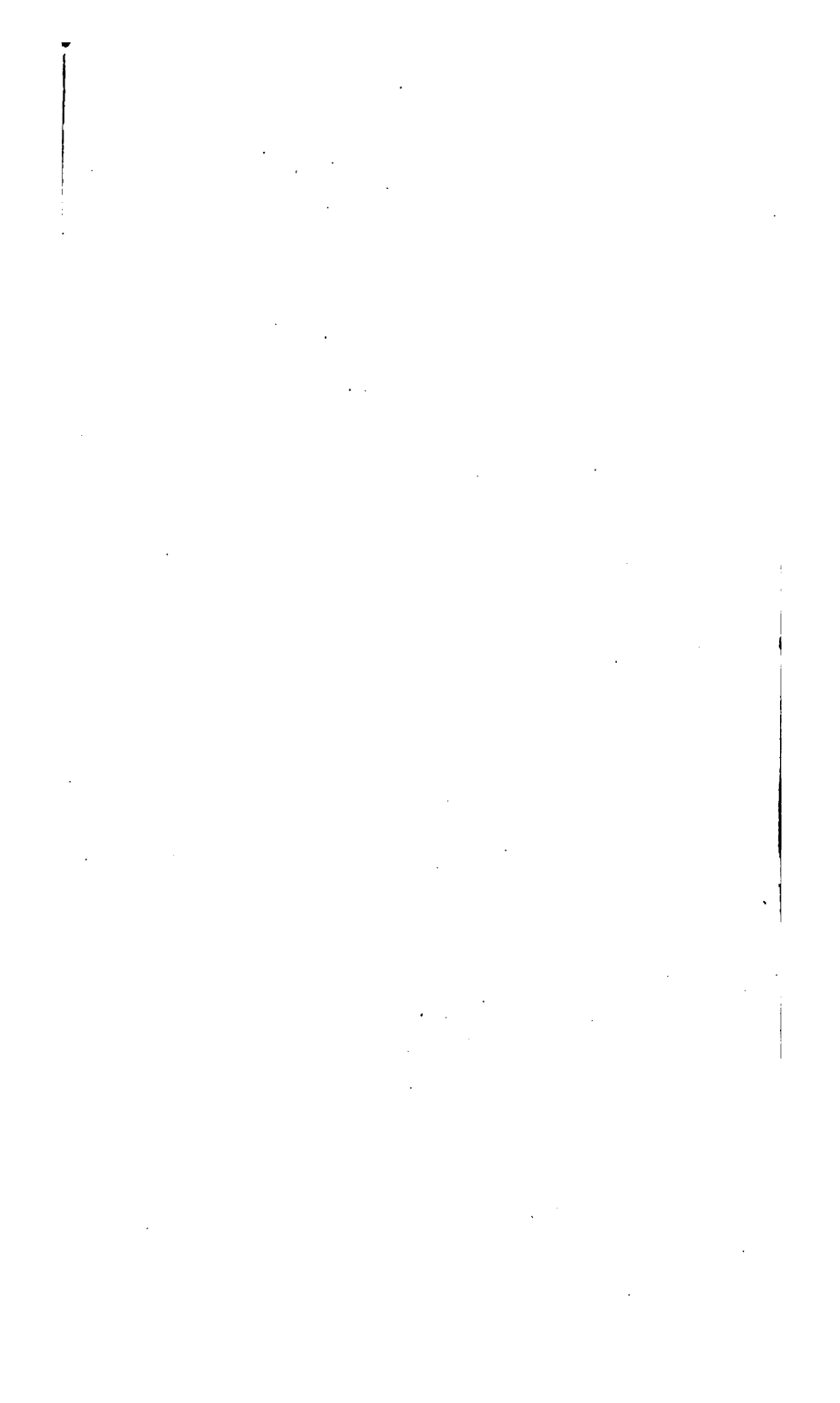
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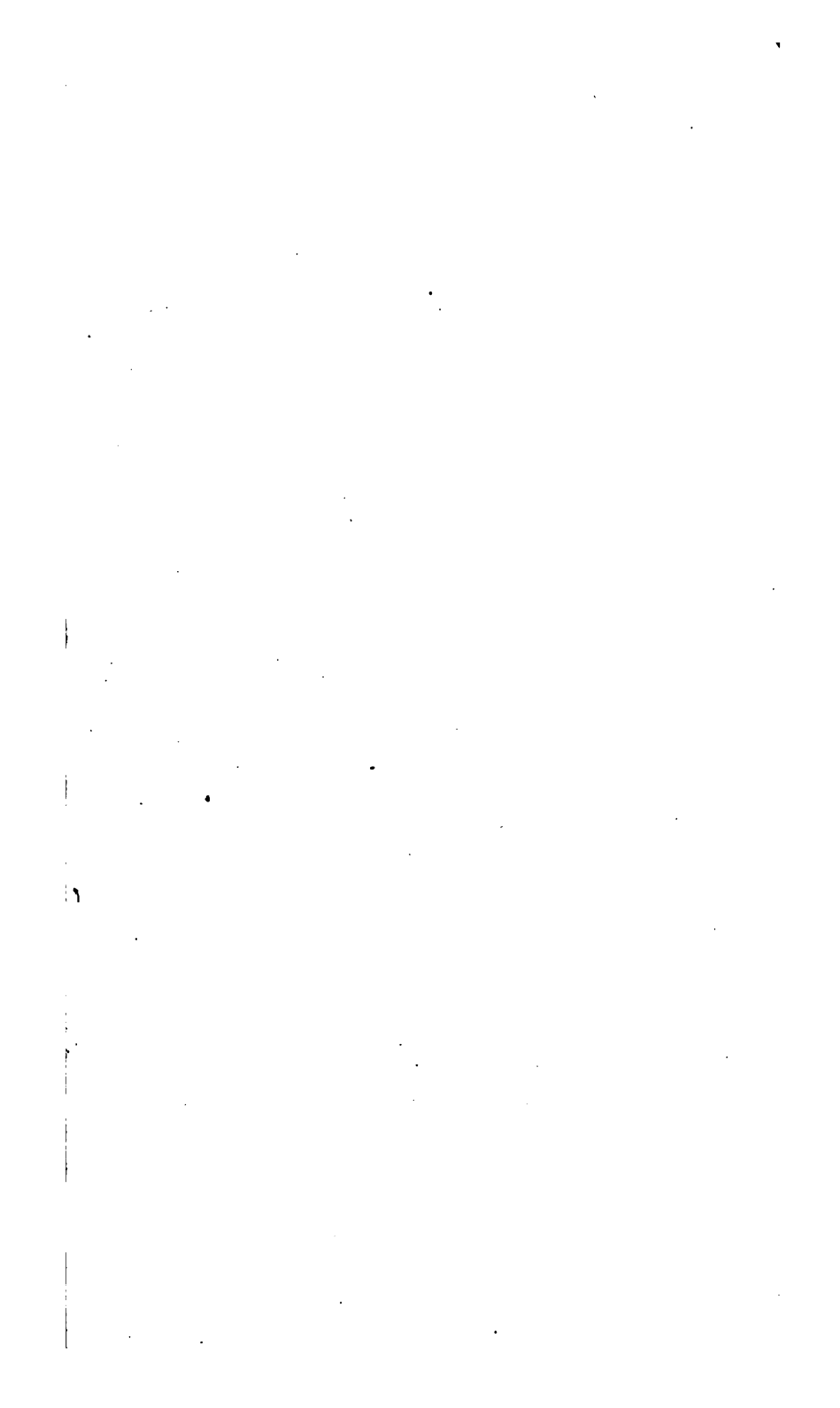
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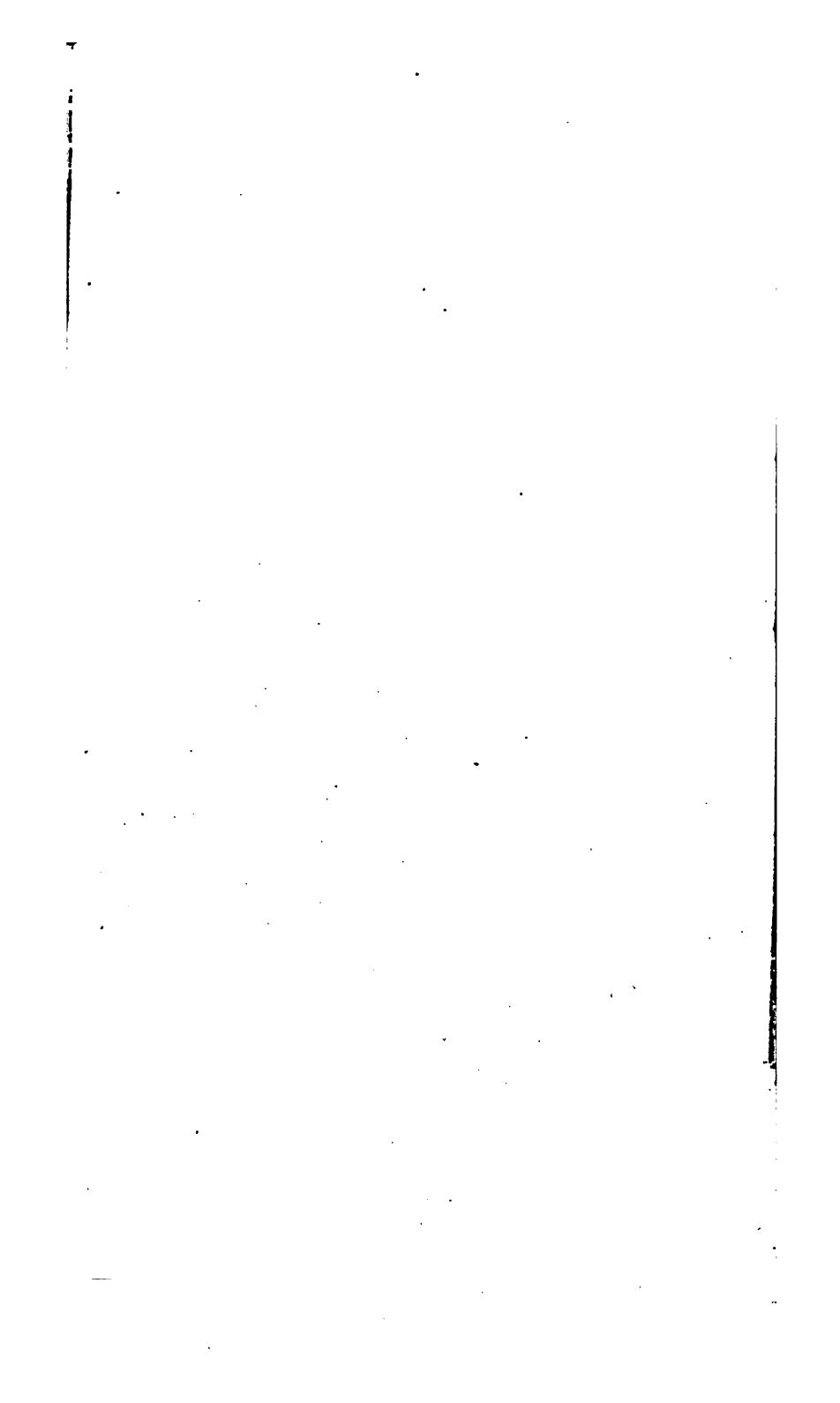
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NOTES

OF A FEW

DECISIONS

IN THE

SUPERIOR COURTS

OF THE

STATE OF NORTH-CAROLINA,

AND IN THE

CIRCUIT COURT OF THE U. STATES,

FOR

NORTH-CAROLINA DISTRICT.

~~TO WHICH IS ADDED~~

TO WHICH IS ADDED

A TRANSLATION OF LATCHES' CASES.

~~TO WHICH IS ADDED~~

NEW BERN:

FRANCOIS-XAVIER MARTIN.

1797.

Oct. 15, 1913
Transferred to

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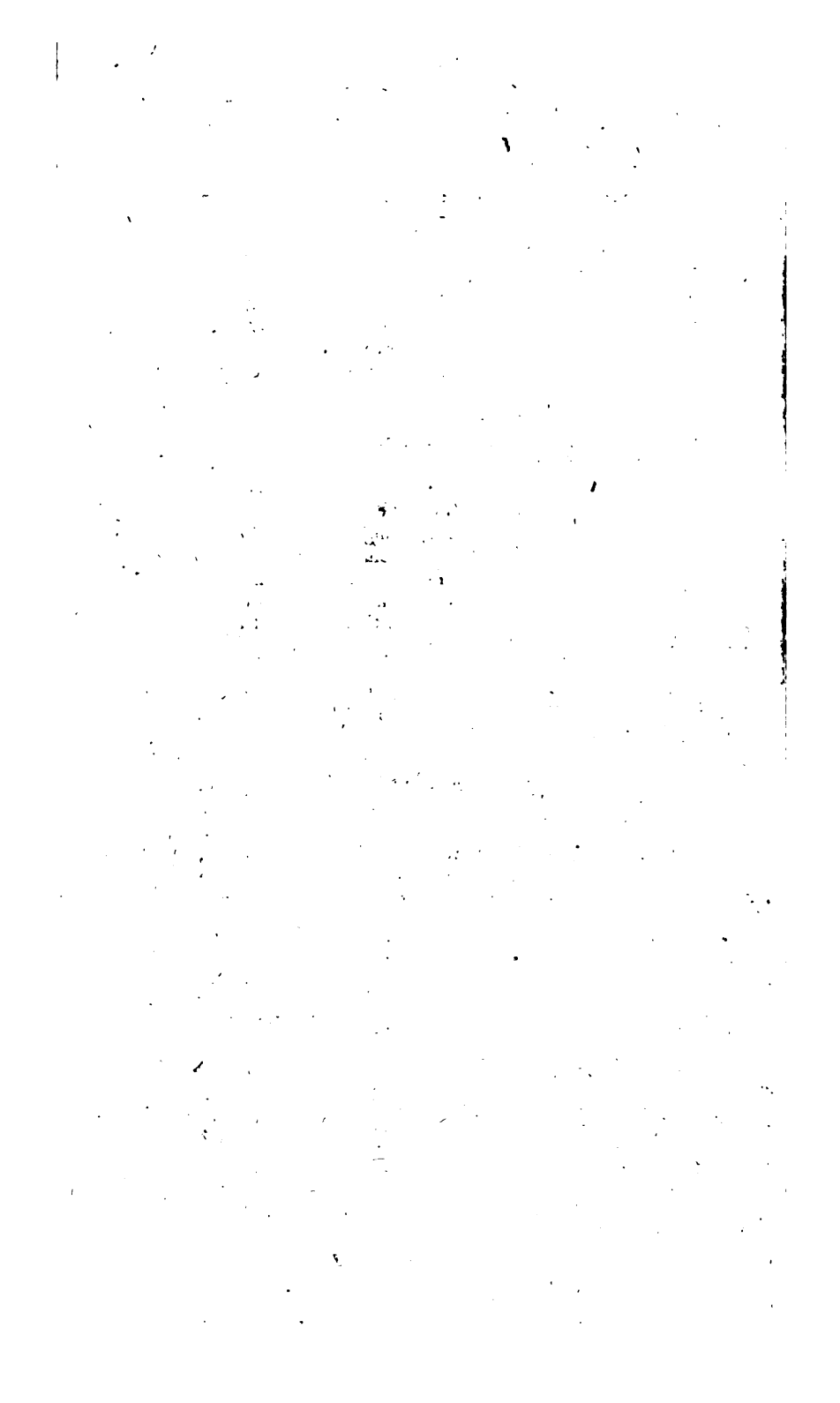


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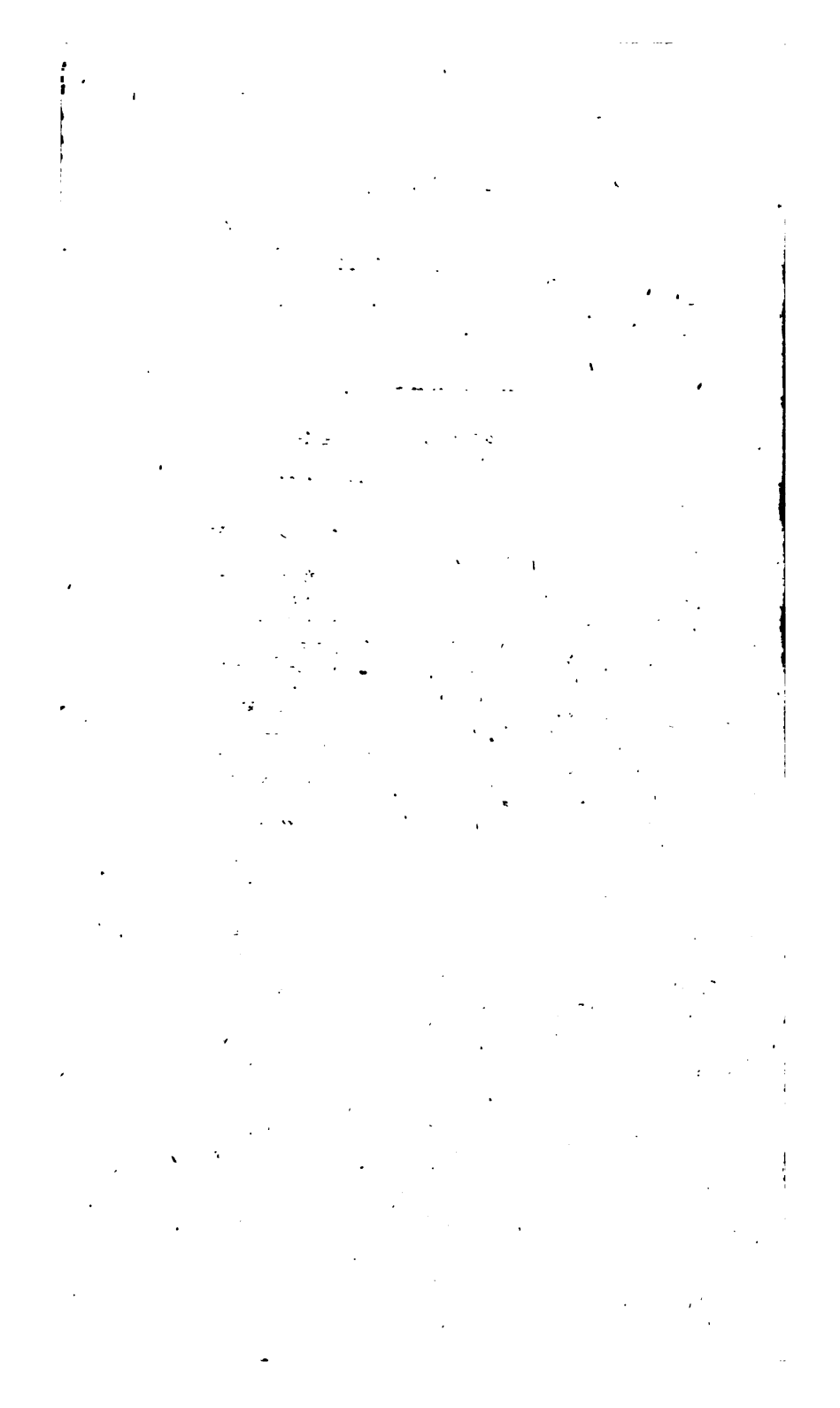
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UPERIOR COURT OF LAW. FAYETTEVILLE DISTRICT.

April Term, 1795.

JOHN INGRAM, Assignee &c. *versus* JOHN HALL.

DEBT, and *non est factum* pleaded. The jury being sworn, this special case was made, *viz.* "The jury being sworn in this case, a paper writing was produced in the words and figures following, that is to say,

Ten days after this 22d, June, 1793, I promise to pay to William Cutlar, or order, for value received, one hundred & seventy-five pounds, ten shillings, currency. Witness my hand & seal, day & date as above written. £. 175, 10. JOHN HALL, (Seal.)

"On the back of said paper writing, were the following endorsements, *viz.*

Pay the within to George Hooper, or order. WM. CUTLAR.

Pay the within to John Ingram, Esq; or order. G. HOOPER.

"It appeared on inspection of the paper, that there was not a subscribing witness to it, but that there was a SEAL; and the plaintiff's counsel offered a witness to prove the *hand-writing* of the defendant, to support the action. To this, the defendant's counsel objected, as insufficient in law to support the action.

"The court therefore directed the witness to be sworn, and a verdict to be taken, and reserved the question of law, on the above objection, for further consideration.

"It was further objected in the case, that an *action of Debt* cannot be maintained, on the writing produced; whereon also the court took time to advise: and it is agreed, in case the court shall be of opinion, that, on *EITHER* of these objections, the plaintiff ought not to recover, then a *NONSUIT* shall be entered.

"But, if the court should be of opinion, that *BOTH* these objections are *INVALID* in point of law, then *JUDGMENT* to be entered for the plaintiff."

The witness not only proved the *NAME subscribed*, but also the word *LAL*, written in the circumference of the seal and scratched with a pen, to be in the *hand-writing* of the defendant.

At October Term, 1795, the Court gave their opinion as follows,

Judge HAYWOOD:—

BEFORE we proceed to the immediate investigation of the first question—*WHETHER, in the case of a sealed instrument, UNattested by any SUBSCRIBING witness, the HANDWRITING of the party MAY be ADMITTED in evidence?* it may be proper to take a view of the origin of DEEDS, in our law, and of the various changes and alterations, the LAW has undergone; with respect to that species of instruments, in order to be accommodated to the different circumstances, which different periods of time have produced. This may have a stronger tendency, to place the present question in a true light, than perhaps any other method of treating the subject that could be devised.

LET us consider, therefore, 1st. the *origin* of reducing contracts to WRITING;—2dly. the *origin* of SEALING, with the uses that have been made of it, at different periods;—3dly. the *origin* of DELIVERY.

We will then consider the *only* circumstances *essential* to the constitution of a deed at this day: and, lastly, from all these premises we will draw conclusions applicable to the point now in controversy.

I. ALL writers agree that the northern nations of Europe, who spread themselves over the southern and western parts of it, were an illiterate people, who despised all arts but those of war. The Saxons who founded the heptarchy in England, and afterwards the English monarchy were part of those people—they had, in general, no knowledge of letters—their laws and customs, their legal ceremonies were preserved and transmitted to others and to posterity by tradition only. To keep up a military spirit, and to have a band of warriors always ready at command, it was the universal practice of the conquering leaders of these nations to divide the conquered country into allotments, which were parcelled out to their followers:—first, *at the will* of the lord or leader; next, for the better encouragement of agriculture, *for life*; and, last of all, *for ever* or *in fee*. About the time, when it began to be usual to make these grants for life, the christian religion, under the auspices of the papal see, was propagated in England by St. Augustine and others, and was soon adopted and received as the national religion. Its priests were men of some learning—they here, as in all other places where they have been received, began to grasp at temporal advantages—they inculcated upon the minds of the people, that it was an act of the most meritorious piety to provide for the maintenance of the ministers of god. This doctrine had its effect, and donations of allotments of land began to be made to the church, also *for life*: but *this* life was supposed to be PERPETUAL, as the church NEVER died. The donations of these allotments, for want of a better method of perpetuating the transaction among the laity, who knew nothing of letters, had always been made by *ivery of seisin*, done in the most solemn form, to impress it on the mind, before a number of the co-vassals or tenants of the lord, who, in case of a dispute, were assembled in the lord's court, and determined chiefly by the remembrance which these impressions had made between the parties. The presumption was, that if some

who were present, from length of time, had forgotten some of the circumstances or conditions annexed to the donation, others of them might remember them; and so, by the united remembrance of all together, might, in the end, ascertain the true state of facts. This, by the way, I suspect was the *origin* of *JURIS*, and of the *unanimity* required in their decision. Each juror contributed the circumstances lodged in his mind to the general stock of information which formed the verdict; and, by conference with his fellows brought to their recollection the circumstances which he remembered, and the others, or some of them, had forgotten, until at length the whole transaction was renovated in the minds of all. This mode of conveyance answered the purpose sufficiently, when donations were for the life of an individual only; for it would seldom happen that he would survive all the other *pares* of the lord's court, who were present at the investiture. But, when donations were made for life to a churchman, for the benefit of his church, and it was a received maxim that *the church NEVER died*, this method no longer answered the purpose as to them, for the donation might have continuance, and the conditions, upon which it was made, might come in question, after every one of the parties present at the investiture were no more, and then the allotment might be liable to be resumed by the lord; all lands included in his territory or manor, not granted to one of his vassals, belonging to him; and, after the death of all the *pares*, no evidence remained of the investiture, much less of the conditions annexed thereto. It became necessary, therefore, when the church was concerned, to have some other mode of perpetuating the transaction than mere livery of seizin; and the clergy, being the learned part of the community, devised the mode of reducing the terms of the donation to *WRITING*, *Sul-tivan*, 82, and when the lord, on account of sickness, the distance of the land from his place of residence, his being employed in some other business, or some other cause, could not go upon the land to make livery, then the writing containing the terms of the donation was solemnly delivered, before the peers of the court also, in lieu of the land, to the end that, being delivered before them in so solemn a form, they might be witnesses of the investiture of the land mentioned therein, and might be able upon trial to ascertain the identity of the paper delivered. This was not indeed a *complete* investiture of itself, it was termed the *improper investiture*, and bound the lord to make a more formal livery of seizin of the land contained in the deed at a future day and was a sufficient security to the donee in the *interim*. Experience evinced the safety and certainty there was in reducing these landed contracts into writing, in the case of churchmen; and the laity, wishing to be as secure as possible in their possessions, adopted by degrees the same method; which afterwards, when these allotments were extended to the heirs of the possessor, became equally necessary for the laity as the clergy, and from that time, deeds of feoffment, to accompany the livery of seizin, became generally used, though the livery of seizin was good without them: and these contracts in writing, being found so advantageous in perpetuating the terms and conditions of a *landed* donation, were, by degrees, converted to the

purpose of perpetuating other contracts, that concerned only *personal* estate, which, formerly, amongst the unlettered Saxons, were completed by shaking of hands only, *2. Bl. Comm. 448.*

II. The preserving the remembrance of a landed contract, having thus become general, in the times of the Saxon government in England, and the general illiterature of the laity of all ranks prevailing universally, it was customary for them to put some *mark*, usually the sign of the cross, to identify, as well as they could, the writing they had agreed to: and this was done *coram paribus*, who, upon the trial, might remember it, or be able to distinguish it from some circumstance attending the making the deed or the mark itself. But, upon the Norman conquest, it became the policy of the conqueror and his sons to abolish the Saxon customs, and for this purpose to draw as many causes as possible to be determined in the *curia regis*, where the judges were Normans. *Sull. 339, 343, 369, 374*, where the *pari* of the neighbourhood were frequently not called upon to decide between the litigants, as they uniformly were in the court of Saxon institution, the county court, hundred court, &c. About this period, the bishop was separated from the sheriff, in his county court, and it was established as a rule, that the county court had not cognizance of any demand of more than forty shillings value; the consequence of which must have been that all causes were carried in the *curia regis*, and it must frequently have happened also that the marks affixed to the deeds, for want of the *pari*, were incapable of any distinction and of course any proof of the identity of the instrument. This produced an inconvenience. The greatest men among the laity could not write their names, so as to give a proof of identity that way, and being under the necessity of providing some more certain criterion of identity, than that of the sign of the cross, they introduced for the first time into England, the practice of impressing their writings with a seal. *Sullivan. 374. Terms de ley, verbo Facti. Gil. law evidence 17, 18, 20, 78.* The seal exhibited the emblem which its owner had affixed to his person, when covered in the field with his coat of mail, and which, being portrayed upon some conspicuous part of his dress, served to designate his person. These symbols came to be very much in use, at the time of the crusades to the holy land, in the time of Richard I. and after, and were continued by the knights and other persons, who then used them by way of distinction in their families, after their return home. The seal, therefore, of any distinguished person, could immediately be known by inspection only. This method of sealing, however, was not introduced all at once, but by degrees. It was at first only used by such as were entitled to those distinguishing symbols—by the nobility and gentry only. For *Lucie*, chief justice of Henry II, reprimanded a common man, who had made use of a seal, saying that belonged to the nobility only. *Terms de ley, ubi supra, and several other books.* But it is to be remarked that about this period, and for some time before, the common people had but little use for seals, as they could have but few contracts. The conquest had introduced the maxim of

non-alienation without the consent of the lord. A great number of them were villeins, who could not acquire property at all, but for their masters; and as to the feudal tenants, they were continually harassed by attending their lords in war. Commerce had not yet begun to flourish and increase the PERSONAL property of the nation: and the old law authors of those times have scarcely a chapter upon personal property. 2. *Bl. Comm.* 385. And even when the doctrine of non alienation began to wear away imperceptibly, the common people, being not entitled to any family distinction, had no seals and were obliged to contract as formerly was used, before the introduction of sealing. The uncertainty of such a method begat, in combination with other circumstances, peculiar to those times, the practice of conveying by FINE, where the whole transaction with the precise terms of the conveyance were recorded in one of the king's courts, and obviated completely any future controversy respecting the execution of a deed. At length, however, the eyes of the nation began to be opened to their true interest: trade flourished; agriculture was encouraged; personal property increased; lands, or part of them, at least, began to be freely alienated: they were made liable to answer the debts of the merchant, and as to part of them the debts of any other proprietor. Contracts, both for real and personal property, became frequent among all ranks of men. The necessity of authenticating their written contracts became urgent; they of course used the best mode then known. They broke through the privileges of the nobility and gentry, and made seals with such impressions as each man's fancy suggested to be the properest mark for distinguishing his contracts. By the time of Edward III, seals were in general and common use. *Terms de ley*; *ubi supra*. *Cunningham*, title *deeds*, who cites *Perkins*, 229, and *sequentia*; and it became a rule of law that a DEED could not be constituted, without a SEAL; and the method of signing with the sign of the cross or some other mark had gone into total disuse. Thus it seems clear, that the seal was originally introduced in the place of signing, as an evidence of the identity of the writing, which contained the party's agreement, and afforded a full proof thereof by the inspection of its impression only, and signing by the party was held unnecessary and useless. In reality it could contribute but little to the proof of the writing, as long as the illiterateness of the people continued; which was until some time after the introduction of PRINTING into England, in the time of Edward IV. Inasmuch that, as late as the time of Henry VII, the being able to read was held to be a LEGAL proof of a man being a clergyman, or clerk in orders, 2. *Bl. Comm.* 360.

This UNIVERSAL use of seals, however produced its inconvenience, when every man who made a contract was obliged to use a seal to authenticate it. Many of those seals were not known to the jurors, and they could not determine in many instances on the authenticity of the instrument, upon the inspection of the seal only. They were under a necessity, therefore, to call upon those who were supposed to know the seal which the party used, to say whether that was the impression of his seal or not; and upon this evidence they decided,

and some times upon the comparison of the seal with impressions upon other instruments, which were proved to be sealed by the party. But still, in contemplation of law, these seals were held to contain an *INTRINSIC evidence* in themselves of the contract to which they were affixed, and, therefore, as well as for the purpose of being compared, the rule of law was established that they should be carried out by the jury. *Gill. law of evidence*, 20. But with respect to those seals which still retained sufficient distinction in themselves, as the great seal, the seals of the courts of justice, the seals of corporations and some others, no proof as to them was required or perhaps allowed. They still continued to answer the genuine purposes of seals at their first introduction, and were full evidence of themselves. The people began at length to forget the original use of this institution and to seal with *any* impression they could get, and the law, rather than invalidate the whole transaction left it to the jury to decide whether that was the seal of the party or not. In this country the people have departed still further from the true use of seals, by *not* making any impression at all; *SCRATCHING something LIKE a SEAL*, upon the margin of the paper, and making *THAT pass for a SEAL*. To the first of these abuses the law has conformed and will now deem the sealing to be sufficient, if found by the jury to be the seal of the party. For fear of destroying some contracts improperly made, at first, it has relaxed from strict propriety, and the practice of sealing with *any* impression has become general, and is now, from necessity, allowed to be good in *every* instance. *Cunningham, verba deeds*, cites *Perkins*, 129—34. *Cro. Car.* 149. *Gil. L. E.* 20, but still the contemplation of law is in conformity to the ancient use of seals. They are deemed the signs of authenticity; are supposed to have an *INTRINSIC evidence* in themselves, and for that reason are carried out by the jury. *Gil. L. E.* 17—20. cites *Sid.* 145, *Hard.* 118. *Plow. Comm.* 411: and Sir Edw. Coke, speaking of deeds, page 6, *b*, says "also the deed may receive credit *per collationem sigillorum, scripturae, &c.*" and Baron Gilbert in his note upon 2 *Ba. Ab.* 494, says "the seal appearing, it must be presumed to be put there by the parties to the deed," cites *Leo.* 25, *Owen* 23, *Bend.* 1. In the reign of Henry VII. and Henry VIII. learning, and the art of writing, had become much more general than in former times, and by this time also seals had become much less a mark of distinction, and proof of the individual contract made by the parties, than in former reigns: but the rule, that the deed must be authenticated by the party's seal, had passed into settled law. In order, therefore, to give a sure proof of the seal which proved the writing that contained the agreement of the party, subscribing his name, at the foot of the instrument, immediately after its conclusion and prefixed to the seal, in the same place and in the party's own handwriting, began to be used. *Noy.* 163. And although it was held in conformity to the rule then established, and which has ever since continued, that such a signature was *NOT necessary to the ESSENCE of the DEED*, yet where the jury could not decide with respect to the deed, upon inspection of the seal merely—nor be satisfied by a witness who knew the impression—

not by a comparison of the seal in dispute with other seals made use of by the same party, they were allowed to form their judgment upon the hand-writing of the party prefixed to the seal; and that was the *scriptura* intended by sir Edward Coke, in the passage above cited, where speaking of the doctrine of deeds and of presumption, he says "also the deed may receive credit; *per collationem sigillorum, scripturae, &c. et super fidem cartarum; martius testibus exiit ad patriam, de necessitate sitate, currendum.*" Co. Litt. 6. b. It may be here supposed he meant the handwriting of the witnesses; but this is not his meaning, for he says expressly, in the very next page, that the clause of *hujus testibus* is not essential to the deed, and in page 6, a, he says "very NECESSARY it is," by which he means *advisable or prudent*, "that witnesses should be underwritten or endorsed for the better *strengthening of deeds*" (not that it is absolutely necessary to make them valid), "and their names, if they can write, written with their own hands," not that they must necessarily be subscribed with their own hands. Even, at this day, there were many witnesses who could not write their own names, and their names were to be endorsed, and when these witnesses, namely, witnesses who had not subscribed their names in their own hand-writing, could not be found or were dead, then the deed was to receive credit *per collationem sigillorum et scripturae*, coupled together. This proves the position, that the signature of the party was used as a PROOF of the SEAL. If it was not evidence of the seal, then it was in vain to prove the hand-writing at all: for that of itself was totally *unessential* to the deed, and made no part of its existence; as the same author had said in the page last preceding, and as is held to be the law at this day. Salk. 462, pl. 2. And, that the proof of the signature of the party, when admitted, is used as a proof of the seal, is avowed in terms almost unequivocal, by Baron Gilbert, in his law of evidence, 99, 103, where he says "for though the deed be produced under hand and seal, and the hand of the party that executes the deed be proved, yet this is not *full* proof of the deed, for the *delivery* is NECESSARY to the ESSENCE." Does not this manifestly imply that the proof of the hand-writing, proves EVERY thing, which is of the essence of the deed, BUT *delivery only*: and of course that it proves the SEAL? With respect to an attested sealed instrument, it is the common practice, in the English courts, where the witnesses are not to be found to prove both the handwriting of the witnesses and of the party. Bl. Rep. 532. Forbet, executor &c. vs. Wales, such proof admitted, before Lord Mansfield, to be given. 2 Brown's Ch. Rep. 536, 538, the same proof admitted before the Lord Chancellor, and stated, by the counsel opposed to the fact it meant to establish, to be evidence in the common form. The same proof must also have been admitted in the case of Gould and Jones reported in Bl. Rep. 384, as may be seen by having recourse to the case itself; and the same kind of proof was clearly admitted in the case of Cogblan and Williamson, reported in 1 Douglass 93. But, why, in all those cases is the proof of the party's signature held necessary, if proof of the witnesses hand writing proves BOTH *sealing AND delivery*, and NOT the *delivery only*? From the reason of the thing itself, and more especially from

the great weight of these combined authorities, it seems to be a conclusion fairly warranted, that *at this day*, whatever it might have been *formerly*, the seal is in some instances proved by the signature of the party. This holds in all those instances, where the signature of the party is admitted to be proved : and that the seal *always since its first introduction* has been used as an evidence of the writing, in which the party has deposited his agreement.

III. WITH respect to the DELIVERY, I have no more to add to what has been already said, relative to its coming into use instead of the livery of seizin, and being, like that, made in solemn form *coram paribus*, to the end it might make the deeper impression in their minds, than, that this solemn delivery of the deed *coram paribus*, being found to be well calculated to make the desired impression in the case of landed contracts, and also, from the same solemnity, to excite in the party a reflection upon the subject he was engaged in, it was continued in other contracts ; and, *like the seal*, was considered an *ESSENTIAL ingredient to the constitution of the deed*. Here it may not be improper to remark upon the excellence of this institution when once established, tho' introduced gradually and for other purposes, in preventing all manner of surprize upon the party. It was first to be *written* ; this necessarily employed some time ; he had the interval for reflection : it was to be *read over* to him, if he requested it : then the wax was to be prepared and melted ; next a *seal* to be procured ; then an impression to be made : thus gradually approaching to the final act, still giving time for reflection, and exciting by each new act still greater apprehensions, and last of all, lest the former precautions might not be sufficient to put him upon reflection, he was called to go before the *peers* of the neighbourhood, and to make a *solemn DELIVERY* of the instrument. After all these ceremonies were complied with, it was scarcely possible to believe that the party was circumvented by fraud, or surprized into what he had done. After the *peers* were diffused, and the authority of the county and hundred courts diminished, I apprehend a delivery before the *peers* went out of use, but that a delivery of the contract was still used as a sign of the party's assent to the contract contained in the deed, and has ever since been deemed *necessary* to give it its *final VALIDITY*.

SUCH seems to be the *origin and progress* of the several circumstances of WRITING, SEALING and DELIVERY of DEEDS, which came into use, not all at once, but at different periods of time, and were used for *perpetuating, authenticating and proving the complete and final ASSENT* of the party to his contract. Any other concomitant circumstances, besides those, tho' they have been sometimes used, and said to be incident to deeds, as *arguing by the party*, SUBSCRIPTION by witnesses, and many other, as may be seen in *Co. Litt. 71a* : yet they have NEVER, at any period of time, been held MATERIAL to the *ESSENCE of the deed* ; unless perhaps in some instances, where such circumstances have been required by statute : and that these are the *only necessary circumstances* is proved by all law writers both agri-

ant and modern. *Co. Litt.* 7. a, says "I have termed the *said parts* of the deed *FORMAL OF ORDERLY parts*, for that they be *NOT* of the *ESSENCE of a deed of feoffment*. For if such a deed be without *pro-mises, habendum, tenendum, reddendum*, the clause of *warranty*, the clause of *in cuius rei testimonium*, the *date* and the clause of *hinc testibus*; yet the deed is *good*: for if a man by deed gives lands to another and his heirs, without more saying, this is good, if he *put his seal, deliver it, and make livery accordingly*." Wood, in his institutes, adds "where livery of seizin is necessary," importing as lord Coke clearly did also, that if it were not a deed of feoffment, but a deed of some other kind, then putting the *seal* and *delivering* the writing, would make it a *good deed*. The same definition is given and the same circumstances only mentioned as necessary in 2 *Re.* 4, 5. 10 *Re.* 92. 3 *Ba. Ab.* 393. 21 *Ba. Ab.* 493, *ubi citat* 2 *Roll's Ab.* 21. 1 *Nell. Ab.* 613. *Terms de ley, verbo Fiat*, *Co. Litt.* 171, b. *Gil. L. E.* 78. *Sheppard's touchstone of common assurances* and many others.

After the production of this concurrent testimony of so many authors, it seems scarcely necessary to say that the subscription of witnesses in their own handwriting to a deed was never held necessary to its constitution. The reasons already assigned for the first introduction of seals and their continuance for a long time afterwards, namely, the illiterature of the laity, proves also that the subscription of witnesses was not used during that long period, which commenced soon after the conquest and continued to the time of Henry VII. and Henry VIII. Even the magna charta of king John given at Running mead, in the year 1215, in the former part mentions the archbishops, bishops, barons, &c. not particularly naming them, and in the end is attested in this manner, *testibus supra dictis et multis aliis*, and lest any thing should be added or subtracted from the form of the writing, he thereunto put his seal. *Be. law tract.* 35, 36. In 1216, the fifth charter of Henry III. is attested thus *testibus omnibus prenomiatis et multis aliis*. I infer from this, that in a matter of so much moment they certainly used the best method of attestation then known or used, and as they did not subscribe their names, it is an evidence, that the subscription of witnesses in their own hand writing was not then practised. The attestation of private deeds was in the same manner; the names of the witnesses were underwritten or endorsed, and this was used only as a memorandum, to shew who of the *partes* were present, so the end they might be called upon and associated to the jury, upon the trial of the issue, when the deed was denied. *Vide Co. Litt.* 6 a & b; and sometimes it was said *teste comitatu, hundredo, &c.* 2 *Bl. Comm.* 307. I apprehend the practice of subscribing by the witnesses came into use at the same time, with the subscribing by the party; at a time, when the law respecting deeds was already firmly established, and when both these circumstances were held *unessential*, tho' perhaps both of them at the time might be *useful*: the signature of the party to prove his *seal* and that of the witnesses, when they could not be found, to prove the *delivery* of the deed. For when it was proved, by his own signature to be the *seal* of the party, these a-

rose a very strong presumption from the proof of the handwriting of the witness, that they had been present at the delivery. But this kind of proof was only resorted to, when POSITIVE testimony could not be procured, and was not in the party's power to produce. To proceed a little further the Statutes of 2 Ed. II. & 9 Ed. III. speaking of the trial upon the issue of *non est factum*, say, "the witnesses shall be summoned, WHERE THERE ARE witnesses named in the deed; but if they do not appear, at the day appointed, the trial shall proceed, notwithstanding their absence." Hence the conclusion follows, that in those days, there were some deeds without witnesses named in the deed, and as to them there was no delay of trial. Secondly, that there were other deeds, wherein witnesses were named, and that as to them the trial, could not be in their absence, for they were to be summoned and to make part of the jury. Thirdly, this statute directs that they shall be summoned as usual, but in case of their non appearance the trial shall nevertheless go on, by the jury that are present. Fourthly, that there was some other method then used of proving a deed, than by the witnesses named in the deed, or else this statute operated injustice by ordering the trial to proceed upon the first default of the witnesses (who perhaps, might be convened at another day) and by so doing rendered the deed invalid and void; and this it is unfair to presume. That it could be proved by other means is held by Lord Coke 121. b. where he assigns the reasons why the law requires the *proffer* of a deed, in pleading to the court, to wit, that it may be proved by witnesses, or other proof, if denied. This opinion is strongly confirmed by some modern decisions, where the rule of law is held to be that a witness shall not be permitted to deny his own attestation. The true meaning of which rule is that if he does deny it, upon the trial, the deed may be proved by others, who were not attesting witnesses, and whose names were neither subscribed nor endorsed. Douglass, 216. 4 Burr. 225. This proves, beyond all possibility of doubt, that the attestation of witnesses is not necessary; for if the delivery MAY be proved by persons who did not attest, in case of an attested deed, can there be any solid reason assigned why they may not prove the delivery in case of an unattested deed, where there are no witnesses to deny their attestation, and by that means bring a suspicion on the instrument? Upon this point, I think, it may be affirmed in perfect consonance with the rules of law, that at this day, the attestation of witnesses, either by endorsing or underwriting their names in the hand writing of the drawer of the deed, or by a subscription of their names in their own hand writing is in NO WISE essential to the validity of the deed, and from all those premises we may also infer some other conclusions.

If writing, sealing and delivery be the ONLY ESSENTIAL parts of a deed, and the law deems it valid without the further ceremony of a subscription by witnesses, then, there MUST be some OTHER competent means of PROVING the DEED, OTHERWISE than by subscribing witnesses. It would be absurd to attribute validity to an instrument

which had these essential parts, and yet say it should NOT be read, to benefit the party producing it, UNLESS proved by SUBSCRIBING OR ENDORSED witnesses. But what OTHER means are competent?

To form a decided opinion upon this head, we must remember, that there is but one general rule in relation to evidence, and that is that *the law requires the best evidence*. But this rule is always relaxed upon two grounds, either from ABSOLUTE necessity or a necessity presumed from the common occurrences amongst mankind. The rule is not so stubborn, but that it will bend to the necessities of mankind and to circumstances not under their control. The rule is adopted only to obviate the fraud of mankind. One shall not deceive the jury by offering a less convincing testimony to establish his point, when it appears there is a proof more elucidative of the point in controversy, in his own possession or power, which perhaps, he does not offer because it would be decisive against him. It was never meant to exclude the party from justice, merely because he had not, through ignorance, provided himself originally with the best evidence it was possible for him to provide: for then two witnesses would be better than one; a hundred better than two; and so on progressively. A writing would be better than a parol contract; a deed better than either; and a record better than all. Neither was it intended to deprive any one of justice, when, without any default in himself he had lost the better evidence which he had provided originally. It first deprives him of the power of imposing upon us, and then lays itself open to be relaxed, as circumstances shall in justice require. These circumstances, as I began before to mention are of two kinds; those founded on ABSOLUTE necessity; and those founded on a necessity OCCASIONED by those occurrences which are common amongst mankind. We will touch upon the first class only. In the case of deeds, if there be subscribing witnesses to them (see 1 Atk. 49, the argument of lord Hardwicke, in the celebrated case of *Ormebund and Baker*, and mark the implication) they must be proved by these witnesses. Because, it is presumed that these witnesses can give a more distinct and satisfactory relation than any others; having been called upon originally for that purpose: but, if the witnesses be dead, or not to be found, and that be proved to the court, then the *hand writing of the subscribing witness* may be proved; that raising a *violent presumption* in favour of the deed. If the deed be lost, and that appear to the court, then the copy shall be read, as affording a *presumption*. But, if there be no copy, then an *abstract* may be admitted, that affording a *PROBABLE presumption*, and if no abstract, PAROL evidence of the contract may be offered. The true intent of the parties, to be regulated by that contract, shall not be defeated and justice overturned, so long as any evidence remains, which throws any *glimmering of light* on the subject from which a jury may be enabled to infer the real state of the transaction; The subscribing witnesses in the case above stated were not required, because the deed cannot be proved without them, as has been already evinced; but because were they not produced the defendant would be deprived of the cross-examination of those persons he had

provided to give testimony for himself, as well as for the other party, and who, if produced upon such cross-examination, would perhaps give material testimony for him. But, if the subscribing witnesses are not to be had, the law chooses *the least of two evils*. It is better to dispense with the witnesses and receive other proof which may be sufficient, than adhere to the rule, when they cannot be had and so, at any rate, destroy the deed; thus, if the obligee removes the witness, his acknowledgment that he executed the deed, is *PROOF*. *II. Bl. Rep. 623*. In all cases, therefore, where it is apparent to the court, that there is *no POSITIVE* testimony to be had, there must be a recurrence to testimony founded on presumptions, or CIRCUMSTANTIAL proof, as it is called. Therein requiring first the best presumptive proof that is to be had, and in DEFAULT of that, the NEXT best until we have passed thro' all the several grades of circumstances that raise presumption, from that which lord Coke terms the *VIOLENT*, until we arrive at that which excites the *LIGHT* presumption, *on that point* NOT AT ALL. If this be the true theory of evidence, and if an UNATTESTED deed, being *valid*, MAY *some way or other* be proved, as it CERTAINLY may: THEN in the first place the party must produce witnesses who were present, at the execution, tho' not endorsed nor subscribed, as in the case where subscribing witnesses to an attested deed deny it, and if there are no such witnesses, THEN there must be a recurrence to PRESUMPTIVE testimony. And here, as in the case of an attested deed, when the witnesses were not to be had, proof of the party's SIGNATURE would be admitted, as a proof of his SEAL: so, in the case of an unattested deed, I can see no reason, why the same species of proof should not be admitted, where *no better* is to be obtained. There also, lord Coke's doctrine, so often before cited, of COMPARISON by seal, handwriting, &c. might be admitted. The law also will, here, choose the least of two evils; and if sufficient proof of the seal shall be offered, other circumstances shall be admitted to prove the DELIVERY. THIS IS YET necessary. But a small matter is sufficient to establish it, *when once the seal is proved* to the satisfaction of the jury, as leaving the deed, behind him after it was sealed and read, held a good delivery. *Cro. El. 7. Shippen's case*. So where an obligation was written in a book, and the party put his hand and seal to the leaf in which it was written: adjudged this was sufficient, though there was no evidence of a delivery. *Cro. Eliz. 613: Fox vs. Wright*, and many other cases to the same effect. If no positive testimony can be given of a delivery, the party must be allowed to prove such circumstances as will induce the jury to find a delivery. In the two cases last cited, it is surely more compatible with justice, and the rule of evidence in similar cases, to admit, than at once to destroy the deed by rejecting such circumstances which the jury might deem sufficient to convince their minds, together with other circumstances, they might themselves be acquainted with. Surely, there are a great variety of circumstances from which a delivery might, very properly, be inferred. Suppose a deed of feoffment produced and the handwriting of the party proved,

and also possession according to the deed. Co. Litt. 6; 8. Gilb. L. E. 100; suppose part of the principal be paid upon a bond by the defendant, or interest: or suppose the bond should be shewn to him and he requested the party not to bring suit upon it: suppose the bond sufficiently described in a letter and acknowledged, 2, Nels, 762, pl. 25. 2, Ey. Co. Ab. 213, pl. 5. Suppose upon the back of the bond, he enter an endorsement taking notice of it, as his bond. Buller 254. C. K. B. 500; suppose he state it in a bill or answer in chancery, Buller, 236. Suppose he has made a parol confession of it, Douglass, 93, 218; in which last case, the proof evidently would have been deemed sufficient had there been no subscribing witness. Or, by like parity of reason, suppose ANY other possible circumstance, from which a jury might justly and fairly infer a delivery, surely it ought to be received: *even the possession of the obligee*, where the other party could not shew the illegal commencement of that possession, *might afford a presumption in favour of the deed.* But, *as there is no case to warrant me in going so far, I will not yet say that that circumstance alone should be left to the jury.* But such circumstances, as are before mentioned and all others of equal weight, I do think should be left to them, to infer a delivery from or not, according to the best of their judgment. THEREFORE, in the case stated, I am of opinion that *the witness was properly admitted to prove the signature of the defendant; and that the jury were at liberty to infer from thence, that the seal affixed was the seal of the party, and as the ADMISSIBILITY of this evidence is the only doubt stated—as the jury have found a verdict in favour of the plaintiff, subject to that doubt only, it must be intended there was some other circumstance given them in evidence sufficiently evincing the delivery: and therefore as to the FIRST objection, stated in this special case, there ought to be JUDGMENT for the plaintiff, notwithstanding.*

It seemed to be insisted on, at the trial, that the clause of *In witness whereof I have hereunto set my hand AND SEAL*, might be received as an evidence of the seal; and as some case may hereafter occur, in which that clause may have only the words: *In witness whereof I have hereunto set my HAND*: when, *in fact* there may be a seal affixed, I will remark upon this clause a little; more especially, as it is set down in this special case, and the opinion of the court is expected upon it. I would observe then, in the first place, that this clause contains a part of the words of the deed, and the deed itself, or any part of it, cannot be read, *until the SEALING and DELIVERY of it be first proved*; and of consequence this clause cannot be read to *prove the seal until after the seal has proved the clause itself.* And then as to the purpose of its proving or disproving the seal, it is totally useless; and, that such a clause is not only unnecessary in itself, but that the words of it have always been disregarded, is proved by such an abundance of authorities, that the bare citation of them will fully establish the position that the omission of this clause or the addition of it, or the words of it, can have no influence whatever upon the writing itself. Some of them are the following: Co. Litt. 7, 2, Bull,

214. 2 Rep. 5. The deed is good, tho' this clause be omitted. Nels. 623. pl. 7, who cites Moor 3. It is not a conclusion of the deed: for that which is written *after* it, is as much part of the deed, as that which is written *before*. Also 2 Nels. Ab. 621, pl. 13, who cites 3 Bulstrode 30a. "In witness whereof I have hereto put my hand": the deed is good, if there be a seal, tho' the clause do not mention the seal. Cunningham's Dictionary, verbo Deeds, cites Hetley 75. and by the like reason, if it mention *hand* AND SEAL, and it can operate nothing 2 Str. 814, 815; Ld. Raym. 1541, for the seal is not established by the words of the writing, but *e converso*; the words contained in the writing are proved to be the words of the party, by his seal. And, if the words contained in this clause were allowed to prove any thing, the party to be benefited by the deed, would have nothing to do, but to insert this clause, *In witness whereof I have SEALED AND DELIVERED*, and the evidence of the deed would be complete. Suppose in the present clause that the word SEAL had not been in the clause, and yet the seal should appear, with the word seal within it, in the handwriting of the obligor, as was the fact here: would it not be a harsh determination to say it was *not* HIS SEAL? Yet we know such cases often occur:

It may be objected that, if the words contained in this clause, are not suffered to have any weight, then the holder of a *promissory note*, might add a seal to the name of the party; and by that means avoid the act of limitations, and also circumscribe the party in point of evidence. To this, the answer is, that the rules of evidence were established long before the statute of limitations, and that act did not intend to alter them.

2. That the law has guarded against such attempt by making the writing *totally* void, if it should be attempted, and also subjected the party to very severe punishment, for the attempt.

3. If there are witnesses, they may be produced to say what they know of the seal.

4. If there are *no* witnesses, the circumstances to prove a delivery, may throw some light upon the seal itself.

5. The law will not presume such turpitude in any man; the possibility of his committing such an offence will not vitiate the act, as if he had actually committed it; and in this case, as in all others, the injured party should prove the injury done him. Again, if the instrument should be held invalid, because possibly the seal might have been affixed after the execution of it, then more good deeds would be destroyed upon suspicion, than frauds prevented by it. For few men will attempt a fraud of this kind, under the multiplied hazard of receiving infamous corporal punishment, and being forever degraded from their rank in society, and the total loss of the thing secured by the deed, especially if it be of great value. Experience shews that men, not well knowing the technical distinction between a seal and their signature, say witness their *hands* and put their *seals* also, and *e converso*, declare in this clause that they have put their *hands* and *seals*, where they have subscribed their *names* ONLY. Here, as in all other cases, the law chuses the least of two evils. Once more, the sub-

giving witness to a bond may have subscribed, being about to depart for a foreign country, when in fact the deed may not have been secured, but this possibility will not cause a rejection of such testimony; nor shall the seal be rejected, because not mentioned in the statute, for such possibility as is in the objection.

But it may happen in the case of an unattested bond, that there may not be sufficient evidence by circumstances to prove the delivery; and this brings us to another question referred to the court in this special case, which although it is not necessary to be considered in order to the determination of this case, which is an *action of DEBT*, and depends entirely upon the question, whether this be the *DEED of the party* or not? yet, as it has been referred to the court, I suppose, for the purpose of having the law settled, upon this point, also, I will make a few remarks on it.

The question is WHETHER *an action ON THE CASE lies upon SUCH an instrument, when it cannot be proved as a DEED?*

As to this there is one rule certain: that NO SEALED instrument can be given in evidence to support an action ON THE CASE. *Gilb. law of evid. 100. Cro. Jac. 506, 598.* The law has given a remedy of another sort upon those sealed instruments. An action ON THE CASE, depends upon *parol evidence or writing ONLY*. Therefore the action on the case must necessarily be destroyed, when the evidence to support it is destroyed by *extinguishment*; and all *parol contracts* and agreements are held to be *extinguished* when they become clothed in a contract of GREATER solemnity, or evidenced by a sealed instrument, as these SEALED instruments are themselves EXTINGUISHED, so that no action can be supported upon them, between the same parties, when they have passed *in rem judicatum*, and have become matter of record. All this depends upon the rule of law already mentioned, that the BEST evidence SHALL be required. Thus, a bond shall not be evidence, when there is a record of the same matter, nor *parol* evidence when there is a sealed instrument. This rule of law is not to be denied; and then the whole question is reduced to this; whether when a seal appears, the party, who produces the writing to which it is affixed, shall be permitted to say, it was not affixed to the writing originally? It has been for a long time a standing rule of law, framed first indeed for the protection of deeds, the only written instruments then in use, for unsealed instruments are but of modern date, 3 Term. 330, but in policy extending to every written contract, that the least alteration in any material part, shall render the whole writing totally void; and even an immaterial alteration, made by the holder of the instrument, shall make it void also: 11 Re. 27. A bill of exchange, payable three months from the 26th of November, was held to be totally void, it being found by the jury that the top of the figure 6 was blotted out, while in the possession of the holder, so as to make it appear to be the 20th instead of the 26th, and by that means to accelerate the payment; though, in fact, no such acceleration of payment had been attempted, 3 Term Rep. 320. Now, then to apply these rules to the case in hand, if the seal

in no instance nor in any possible case, whatever be supported upon it: and this opinion receives credit from the argument of Justice Heath, in the case of *Gibson and Johnston, vs. Minot and Foster*, reported in *H. R. R. 613*, where, *arguendo*, he lays it down as clear law, that, if the delivery of a bond cannot be proved, it cannot be concluded that it may be given in evidence as a note should: because the creditor having taken his security in a determined form, he cannot at his pleasure alter it, against the stipulation of the debtor; and yet, says he, the obligation includes a promise to pay the money.

Judge M'Coy was of opinion the instrument must be declared upon as a sealed instrument.

Judge WILLIAMS was of opinion that the instrument could not be proved as a sealed instrument, for want of attestation; and therefore ought to be declared upon as a writing only.

Judge ASHES seemed to dissent from the opinion of Judge M'Coy; but concluded that there should be

JUDGMENT FOR THE PLAINTIFF.*

*FASSET and Another versus BROWN. *Peake*, 23.

DEBT on a bond entered into by the defendant as security for George Russell, clerk to the plaintiffs.

The defendant pleaded *non est factum*, and that Russell had duly accounted.

The plaintiffs proved that the defendant brought the bond to the plaintiffs' counting house, subscribed with two names as witnesses to the execution of the bond by him. That on enquiry it appeared that no such persons, as those whose names were subscribed as witnesses, were in existence.

Lord KENYON then said, that the plaintiff was at liberty to give evidence of the defendant's hand-writing, and the bond was so proved.

GRELLIER versus NEALE and Others. *Peake*, 146.

TO prove a partnership deed, the plaintiff's counsel called the subscribing witness, who said she did not see the deed executed; but that William Neale brought it to her, and desired her to put her name thereto as a subscribing witness, which she did: none of the other defendants being present. The plaintiff's counsel then offered to call witnesses to prove the hand-writing of the other defendants, which the defendants' counsel objected to; contending that as it was a deed under seal, bare proof of the hand-writing was not sufficient, but a sealing and delivery must be proved.

Lord KENYON. The subscribing witness not having seen the deed executed, it is the same as if there was no witness at all; and in that case the hand-writing may be proved by another witness. As to the objection that the sealing and delivery ought to be proved, I am clearly of opinion, that if the signature is proved to be the defendant's hand-writing, we ought to presume that it was sealed and delivered.

PERSON *versus* ROUNDTREE.

EJECTMENT. *Roundtree* entered a tract of land, lying in Granville county, on Shocko Creek, and ran the said tract out in the following manner; Beginning at a tree on the bank of Shocko creek, running South — poles to a corner, thence East — poles to a corner, thence North — poles to a corner on the creek, thence up the creek to the beginning, &c. By a mistake, either in the Surveyor, or in the Secretary who filled up the grant, the courses were reversed, beginning on said creek at a corner, running North — poles to a corner, thence East, &c. placing the lands on the opposite side of the creek, from that on which it was really surveyed; so that the grant did not cover one foot of the land surveyed. *Roundtree* settled on the lands surveyed, which was afterwards entered by *Person*, who had obtained a deed from Earl *Granville* for the same, and brought an ejectment against *Roundtree*, for the premises.

On the trial, *Roundtree* proved the lines of the survey, and his being in possession some time; and claiming the same under his grant.

This case was several times argued, by counsel on both sides, when it was finally determined, by the unanimous opinion of the court, that the mistake of the Surveyor or Secretary who filled up the grant, should not prejudice the defendant; and that the defendant was well entitled to the lands intended to be granted, which had been surveyed—and therefore there was judgment for the Defendant.

Ex relatione WILLIAMS, J.

HALIFAX, April Term, 1789.

MERRIT'S EXECUTORS *versus* MERRITT.

DETINUE. This was a case agreed, viz, the plaintiff had brought a suit in detinue for a negro in possession of the defendant, and after issue joined, the defendant restored the negro to the plaintiff; if the court were of opinion that the plaintiff could proceed for damages and costs, or costs alone; then there should be judgment for costs: if otherwise a nonsuit should be entered.

Davis for Plaintiff. *Iredell* for Defendant.

Per Curiam, after this case had been twice argued. The plaintiff may proceed for her damages and costs, notwithstanding the

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HARRIS has been restored to her—and judgment for costs.

BARROW'S EXECUTORS *versus* BAKER.

APP^EAL, on a rule to shew cause why an appeal from the Halifax County Court should not be dismissed; the reasons for the appeal being signed by the defendant himself, and not by his Attorney, in an action of Debt.

It was determined by the court, that the proviso, in the act of 1785, 2, 548, relates only to the cases mentioned in that act, and operates as an exception to that act only; therefore as from actions of debt, an appeal lay by 2; 1777, 2, 82, 348, it was not in the purview of this act.

Iredell for the rule. *Davis* contra.

EDENTON, *May Term*, 1789:

ANDERSON'S ADMINISTRATORS *versus* ANDERSON.

IN this case, the defendant in the county court did not plead the first term: no judgment was taken. The second term the defendant, by his attorney in fact, moved to dismiss the cause for want of a declaration. Whilst the court was considering the case, the attorney for the plaintiff entered judgment by default; the court ordered a nonsuit, and the plaintiff appeared; and this term cause was shewn against striking out the default, and after much argument:

WILLIAMS, J. said he would consider the words in the act of assembly, * "SHALL *dismiss*," as if they had said "*MAY dismiss*"—and they were not obliged to dismiss it, and if the plaintiff was ready with his declaration they would not dismiss the cause, at the second term.

SPENCER, J. concurred.

ASH, J. said he thought the defendant might take the same advantage the second term that he could do the first. That he thought it would be the defendant should be a sufferer by the direction of the court, he obliged to enter a *nonsuit* instead of dismissing the cause, and they all agreed that the default should be struck off, and the nonsuit likewise; and the cause sent down in that condition to the county court.

ALL THE JUDGES present.

EDENTON, *May term, 1789.*

MORRIS, WILLING & SWANWICK *versus* STOKES.

THIS was a default and enquiry. The court ruled that evidence might be given of the difference of exchange between this country and Philadelphia, and in the charge (as bills had not been usually drawn in Edenton, and no one knew the exchange) the court said to the Jury that they might discover the exchange by attending to the value of hard money in this country, and knowing what dollars passed at in Philadelphia.

SPENCER, J. and WILLIAMS, J. present.

EDENTON, *May Term, 1789.*

SAVAGE's EXECUTORS *versus* RICE.

THE court, after argument, said they had considered the case, and were of opinion, and so laid down the rule, that where a party lives out of the state, the adverse party may give notice to such absent party, or his attorney in court, as he may choose.

This opinion was delivered by WILLIAMS, J. who said it was the court's opinion; the other two Judges being present, and assenting tacitly.

In every instance, except where a witness is about to remove (in which case ten days notice is to be given by act of Assembly*) the court will fix the time to be given on such notice.

SURVIVING PARTNER of STANLEY & GREEN, *versus* CUMMINS.

IN this case there was a default, and at this May term 1789, at Newbern, on executing the enquiry, the note produced, appeared to be for the payment of £. 60, specie, in tobacco at the specie price; if not paid within two months; but if within two months, then at 40s. per hundred for tobacco. The note was made in December 1783.

WILLIAMS, J. said it was simply a demand for so much money.

The Att. Gen. who appeared for the plaintiff, attempted to shew that a damage might arise to the plaintiff, who was in trade, by his not receiving the tobacco which was an exportable article; but the court did not give into it, and pressed the Attorney to say in what manner he would direct the jury himself; who said if he had

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the power, he would direct the jury to consider the depreciation of money in order to do justice.

WILLIAMS, J. said the jury were sworn to ascertain the damages sustained, and they might consider the difference in the value of money.

The other Judges assented, but without charging the jury.

ALL THE JUDGES present.

SALISBURY, September Term, 1789.

WELLS *versus* SMITH.

THIS was an ejectment brought on a deed from the state, for lands sold by the commissioners of confiscated property, formerly belonging to *H. E. M'Culloch*. The Counsel for the plaintiff set up their deed from the date, and then relied on the possession of *M'Culloch* as evidence of the fee; the original deed to *M'Culloch*, being carried by him beyond sea, and the records in the Register's office destroyed. They also shewed a plot, and an abstract taken in a list of *M'Culloch's* deeds, and proved the execution of a deed to *M'Culloch*, with possession for several years; the abstract was sworn to and the plot also—This evidence was objected to by the defendant's counsel, requiring the original deed to be produced.

The counsel for the plaintiff relied upon *Buller*, 228, 254, *Salk.* 288, 1 *Med.* 117; *Douglafs*, 572, *Viner*, *Evid.* 231, 2, 3, 4. As to what possession evidence of a fee, they produced and relied on the case of *Cowper* 595, *Buller* 103, *Salk.* 421.

Per Curiam. The evidence is perfectly admissible under the circumstances of this case—and the possession is good evidence of a fee till the contrary appear.

Moore and Davie, for the plaintiff.

Martin, M'Coy and Stokes, for the defendant.

EDINTON, November Term, 1789.

WATSON *versus* WRIGHT.

APPEAL. On a writ of error and an appeal on the same cause by *Watson*, it appeared that *Wright* had recovered *versus Watson* in the county court, and *Watson* appealed to May term, 1789, but did not file the papers. He afterwards gave notice that he intended to move for a writ of error, at November Term, in the same case: and at November Term, *Iredell* moved for a writ of error, assigned errors, and filed a transcript of the records which had been

taken in the appeal. *Alfred Moore*, Att. Gen. moved to dismiss the appeal, and to have the 12½ per cent. urging that the cause was not before the County Court: being removed by the appeal, therefore a writ of error could not regularly go.

The COURT refused to dismiss the appeal: saying they had nothing before them, and that there was no remedy in case the appeal was not brought up, but to sue the appeal bond.

WILMINGTON, *December Term, 1789.*

JOHN COLHARDI *versus* AUGUSTIN STANTON.

THIS was the case of a promissory note, under seal of wafer and paper. The note was given to one *Halser*, who endorsed it to some other person, &c. &c. to the plaintiff. As this was an action on the case, *Williams* for defendant, objected to the instrument being offered in evidence to the jury. It was permitted to go to the jury, and the question reserved—and afterwards on argument (the note had not the expression "witness my hand and seal") *Williams* said the instrument was before the court, &c. and relied on *Wood 246*. *McLain* insisted delivery was necessary and not proved and cited *Gilb. E. 101*.

WILLIAMS, J. was clear it was proper evidence, because the seal is not mentioned in the writing "as witness my seal."

SPENCER, J. concurred.

ASHE, J. differed; said it was a deed; it could not be given in evidence.†

Judgment for Plaintiff.

HILLSBOROUGH, — Term, 178—

TIMS *versus* POTTER.

THIS case was that of a gift of one *Glover* to his daughter, of a negro woman, reserving the use of that negro during his life. Judgment was obtained against *Glover*, and an execution levied on the negro. *Potter* became the purchaser; *Tims* intermarried with the daughter of *Glover*, and after *Glover's* death, brought suit for the wench and her children. On a verdict for the plaintiff, the question, as to the children born during the life estate, was reserved.

† See *Ingram versus Hall*, *ante*, page 1.

The following cases were relied upon for the defendant. *Tiffin vs. Tiffer*, 1 P. W. 500. *Nichols vs. Osborn*, 2. P. W. 419. *Taylor vs. Johnston*, *Ibid.* 506. *Choworth vs. Hooper*, 82, *Brown's reports det.* 1780, 2 Black. 390. *Puffendorff*, Lib. 2, Ch. 4. p. 11. 2, P. W. 42, 1, P. W. 572.

The counsel for the plaintiff combated these authorities by shewing that the principles upon which they were determined would not apply to the present case. That the devise over in the case of *Tiffin* depended on a contingency, &c. In some of the other cases it depended upon a condition. That in the case of money, interest was the sole produce or profit; the principal not impaired thereby; otherwise of a negro; where a use is reserved or devised, the property certainly passed and vested in the donee, as remainderman; the intermediate estate is satisfied by the labour, &c. &c. the doctrine of *Puffendorff* related to the rights of war, &c. &c.

Moore and Davie for Plaintiff. Iredell and Hooper for Defendant.

ASHZ, J. and SPENCER, J. present, at the last argument.

WILLIAMS, J. absent, said to disagree.

SPENCER, J. This case has been twice ably argued. My mind is fully satisfied, and I am sure without bias. When this case was first stirred, I inclined to be of opinion for the defendant; but when the authorities and reasons were examined, on the second argument, they were evidently inapplicable to the present case. We have taken great consideration of this cause, and are now clearly of opinion, that the remainder carries with it the increase. The intermediate estate is satisfied fully by the labour of the negro—Labour is a use that may be commanded by the person, who has the estate; breeding is the order of nature, not of the master. This use must be such a use as the owner may command. The life estate might exhaust the whole estate, the remainderman would take an incumbrance, instead of a benefit. As to the children being an incumbrance on the life estate, the donee or legatee is a volunteer, and people are generally of a different opinion, as to thinking a breeding wench a loss.

ASHZ, J.—This is a question of great importance; much property depends upon it, and it is in some measure moved for this reason. We have had it twice solemnly, and I say with pleasure, ably argued—I perfectly coincide in opinion with my brother SPENCER, upon the gift, the *jus proprietatis* passed to the donee a mere temporary use, limited by the life of the donor, and the *jus possessionis* alone remained. This case has been likened to a devise; there would be no difference, the remainderman is always the principal object of the testator's bounty; and the intermediate estate is well satisfied by the labour—Judge Spencer says something was held out

to the daughter : this was to be a beneficial estate, carrying with it every possible certainty, this case would admit ; thus the increase compensated the loss of value by age, labour, and breeding. It would be in vain to look for cases in point in the English reporters : they never possessed property exactly similar ; their villains were not in all respects in the same condition with our slaves. If a person was to hire out a negro for a year, or a number of years, or devise her for a number of years, or for a time uncertain as a life, and this happens every day, would any man say that, in the first case stated, the hirer was to have the issue ? yet the counsel for the defendant could not distinguish this case from the present : altho' it was repeatedly pressed upon them by the counsel for the plaintiff.

Reason, equity and the general opinion, which I suppose rested on professional, or judicial opinions formerly given, are all strongly in favour of the plaintiff. Men must be permitted to provide for the various conditions of their families, out of this kind of property. In this country, it makes a large part of our estates.—It is a common thing to leave some negroes to the wife for life, and to children afterwards ; the construction has been uniform ever since the settlement of this country ; that the *issue* went to the remainderman ; the labour has been all that was intended or understood for *the use or intermediate estate*. As I said in the case of hire, the increase revert to the person who has the property ; so the increase go to the person who has the *jus proprietatis*, not inconsistent with, but conformable, to the rule.

This construction is founded in justice and policy, as it accommodates this property to the provision of families, and I think it is agreeable to the principles of law. Construction, having obtained for a great length of time, and universal practice ought to be satisfactory evidence of their adoption under legal authority. Therefore enter judgment for the Plaintiff.

SPENCER, J.—The person who has the remainder surely has the *jus proprietatis* ; the person who has the absolute property must have the increase ; if the special proprietor could claim it, it must occasion infinite disputes.

The increase cannot be separated from the absolute property. It is a case peculiar to this country. We must have recourse to general principles of justice and policy : and the authority of generally received opinions ought to have great weight, supported by long adoption in cases of property.

HILARIOUS, April Term, 1790.

HALL versus COX.

COX was bound in a recognizance to appear at *October Term*, 1789, but did not appear, his recognizance was defaulted.

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Cox had been convicted at Fayetteville Superior Court of Law, of horse stealing, and suffered the punishment. He appeared this term, and an affidavit was offered, sworn to by himself, to induce the court to remit his recognizance, and was permitted to be read.

ALL THE JUDGES present.

SALISBURY, *March Term, 1790.*

— *versus* KIMBOROUGH.

KIMBOROUGH, at the last Term, had got a *dedimus potestatem* to take the testimony of some persons—He had failed in getting the deposition, and the cause came on to trial; when his counsel filed an affidavit of his, to continue the cause.—It was objected that *Kimborough* had been convicted of passing counterfeited money, and had suffered punishment; this was admitted: but they argued that he ought to be admitted to make oath, on account of the necessity of the case. Granted by the court.

SPENCER, J. and WILLIAMS, J. present.

EDENTON, — *Term 1791.*

ARMISTEAD *versus* ABBALSON.

THE plaintiff declared on a covenant to deliver tar and other articles to a certain amount; the defendant pleaded that he was always ready: the plaintiff could not prove a demand and refusal or neglect, and was nonsuited.

EDENTON, — *Term, 1791.*

EMSLEY *versus* LEE.

THIS was a suit on a promissory note, to pay £. 100 sterling, according to the *course of exchange*. The court said this case is not different from bonds for Virginia money, or Whitmill Hill's case and others, and charged the jury to find the exchange at 77, 7-9. N. B. The jury found, however, the real exchange,

EDENTON, — *Term, 17—*

MITCHELL *versus* CLARKE.

MOTION by *Iredell* for plaintiff to prove work and labour done, not by the plaintiff himself, but by negroes which he employed: and goods &c. sold and delivered for the use of the

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defendant, by sundry persons and paid for by the plaintiff, under the book debt act.*

Objected by Mr. Att. Gen. *Moore*, that this is neither within the spirit nor letter of the act, because the work was not done by the plaintiff himself, &c.

But, on a long time taken up in discussing the subject, the court overruled the objection, and admitted the plaintiff to swear.

EDENTON, — Term, 17—.

CHARLTON'S EXECUTORS *versus* LAWRY'S EXECUTORS.

ASSUMPSIT, on an account for fees as an attorney. *Iredell* for plaintiff moved to prove the account by testator's books under the book debt act* ; to which the court objected, as the record of the business done would be better evidence ; but on hearing *Iredell* contra, who argued on the hardship of the case and a reason suggested by *Johnston*, that the record would not always be the best evidence in such case, because the attorney might enter his appearance without being employed, the court allowed the books to be given in evidence, the sum being under £. 30.

EDENTON, — Term, 17—.

SMITH *versus* SMITH'S EXECUTORS.

IT was admitted on both sides, that the testator died during the session, and before the ratification of the act, so that the question was when the act should begin to operate.

Iredell for the petition insisted, on the authority of many cases he produced, to shew that all acts of the British parliament take effect as laws from the first day of the session, and therefore *sic hic*.

Johnston for the defendant in answer, relied on the words and spirit of the Constitution,† that the signing of the Speakers is necessary to give the act the sanction of a law.

WILLIAMS, J. and *SPENCER*, J. who delivered their opinions first, concluded with saying that they would not alter the law which had been so long established, and therefore there was judgment for the petitioner.

But *ASHE*, J. concurred in the opinion of *Johnston*.

* 1756, 6, 171. † Sec. XI, p. 270.

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HALIFAX, October Term, 1787.

TULLOCH's EXECUTORS *versus* NICHOLS & FARMER.

MOTION by Penn to prove the bond, by examining evidences of the hand writing of the subscribing witness, who was resident in another state. All the bar, except Jobbston, joined in the argument of this question, being one they wished settled. And the court determined in favour of the motion.

HALIFAX, April Term, 1789.

MAYFIELD *versus* HAWKINS.

THIS was a bill of injunction granted, after a former bill of injunction for the same cause had been dismissed, for not having been served on the defendant in time; for which cause there was a plea in abatement, and on argument the court ordered the plea to be overruled.

ASHIZ, J. and WILLIAMS, J. said that in future they would not allow such a bill to stand, without affidavit of some particular hardship, and that there is no omission on the part of the complainant.

But SPENCER, J. was clear that a second injunction might be granted, without any such circumstance of hardship.

HALIFAX, October Term, 1790.

FERRELL *versus* PERRY.

DETINUE, for a negro formerly the property of John Ferrel, the plaintiff's grand-father, who claims him under a gift which was clearly proved.

The defendant claims under a presumptive gift from John Ferrel, to William Ferrel; his son in law, previous to the gift to the grand-son, and on the trial Ngrawood (who claimed a negro who was given in the same manner and exactly under the same circumstances, tho' there was no suit against him,) was offered as a witness for the defendant.

Objected by Davie for the plaintiff, and to shew that he ought not to be a witness read the case of *Abroms qui tam*, before lord Parker, reported by Lucas, which says that where there is a bill, though not an immediate interest, it is a good objection, and

*See Ingram *versus* Hall, ante page 1.

also in Morgan's Law Essays, a late case before lord Mansfield and justice Butler.

But *Maere* condemned the authority of *Lescar*, and contended that the old rule of being immediately interested was the only sure guide for since the courts have departed from that there has been no land mark, &c.

Of which opinion was the court, for they said that the present verdict cannot be given in evidence in an action against the witness, &c.

WILLIAMS, J. and SPENCER, J. present.

EDENTON, October Term, 1792.

MEREDITH *versus* KENT'S EXECUTORS.

IN the course of this trial it was moved by *Stout*, for the defendant, to read the deposition of a witness who resided in Georgia when it was taken, though he was in Bertie county at the time, and had been attending this court as a witness in the cause, but he was not now present.

Objected by *Lowther*, for the plaintiff, who opposed the introduction of the testimony *totis viribus*, upon the ground that this was not the best evidence; as the witness might have been and was actually summoned in the cause, whilst in the state.

But M'Coy, J. declared it to be the settled practice to admit the deposition absolutely: as by the residence of the witness in another state, there could be no forfeiture for non attendance, though summoned.

HALIFAX, April Term, 1793.

DEN on the demise of WARD *versus* WARD.

EJECTMENT. In the trial of this cause, a question arose upon a deed of bargain and sale, made to the lessor of the plaintiff, by his father, in the year 1771, of the premises in question, which conveyed the whole estate absolutely to the bargainee; but in the premises of the deed there is an exception of the grantor's life time in any part or parcel of the land; though this exception is not in the *habendum*. Whether the lessor of the plaintiff took a fee by this conveyance; as a life estate was reserved to the grantor.

Davie for the defendant, laid it down as an established rule of law that a fee cannot be created by deed to take effect or arise in futuro: and here he said, the grantee was not to take till after the grantor's death.

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Mr. Att. Gen. *Haywood* entered into a discussion of the doctrine of uses, to shew that the use might be limited to take effect in this manner by the statute of uses; although it would not have been good at the common law.

But the Court, ASHE, J. and WILLIAMS, J. stopped the Att. Gen. saying they differed with him in opinion, with respect to the operation of the statute of uses: but they were clearly of opinion without hearing *Haywood* farther, that here the fee immediately passed to the grantee, and the reservation was void.

NEWBURN, March Term, 1793.

WILLIAMS *versus* CABARRUS.

THIS was an action upon the case, for money had and received, by the defendant to and for the use of the plaintiff, upon the following case. The plaintiff and *Lee Dekeyser* made a race to be run the four mile heats, between the *Hyder Ali* and the *Centinel* for £. 500: which was staked by each party in the hands of the defendant, to hold the same, 'till the event of the race was determined.

The horses were started fairly. The *Centinel* had the tract, but the *Hyder* bore down upon him, and at the distance of about 150 yards from the start, the *Centinel* bearing in and having before *roughed* it on the inner side of the tract, was running within the poles which stood at that distance; but his rider checked him short at the pole, and drew his head on the outside of it, knocked it down by the inner side of his neck, and *jostled* against the *Hyder*: who by this stumble, having before rather outran him, entirely took the tract and cleared himself of the *Centinel*. An article in the race articles said that, whoever rode otherwise than fair, according to the rules of racing, should be considered as distanced, and lose the race.

All the witnesses, except Col. *Brown* and Mr. *Edward Jones*, said they thought the horses never touched each other before the *Centinel* struck the pole. Those two gentlemen were rather of opinion that they did touch before, and Col. *Brown* said, he thought the *Centinel* was borne out of the tract by the superior weight and strength of the *Hyder*. They all agreed however, that no direct foul play was apparently used.

The question was, whether the *Hyder* was distanced, as having run unfairly?

Davie for the plaintiff, and *Taylor* for the defendant.

WILLIAMS, J. recited the testimony, and then said that in running a race, one rider may use every fair means to get the tract of

And the reasons coming on now to be argued, *Davie* for the prisoner, did not rely principally upon the objection founded on the want of repeating the words *with force and arms* in the indictment, because of the construction of 37 Henry VIII, 8, 256, but he read the Crown Circuit Companion, to shew that it was necessary generally. But as to the objection of the omission of the district, he contended that the proper *venue* must be laid in the indictment. The true *venue* here, he said, is the district. The manner of getting jury here is superior to that of any other country; they are appointed by indifferent persons in the several county courts. To say a the county of *Beaufort* is not of itself sufficient. If the indictment had said, *in the district aforesaid*, though the district was not otherwise mentioned, perhaps it might have done; to shew the principle he produced 4 *Bl. Comm.* 301. The Grand Jury must be of the proper county and of the vicinage &c. and 349, the excellence of trial by jury, upon which *Davie* here commented, and also upon the necessity of a strict adherence to rigid rules in criminal cases. It must appear, he contended, from the face of the proceedings that the court and jury have jurisdiction, &c. 2, *Haruk*, 303, and as to the necessity of inserting the *venue*, he cited 2 *Hale*, 180. the ville must be regularly named, &c. The ville and county in *England*, he contended, answered to the county and district here. So if the indictment had said, at the county in the district aforesaid, but that would be uncertain if two counties had been before named in the indictment, and of course not good, because in that case the prisoner might have a jury from an improper county imposed on him. *Crown Circuit*, 101.

As to the third objection, there is not a proper connection; and this causes a want of certainty, which is sufficient to vitiate any indictment. It does not appear whether he received his death by the kicking &c. or by the throwing &c. or by either, for want of the word *qu.* Wherever uncertainty like this appears, 'twill not warrant the judgment of the court, 2 *Haruk*, 259. The particular spot on the man's body on which the wound was given must be shewn: and if so, how much more is it necessary for certainty in the manner of giving the mortal wound, in the manner the law requires. It wants certainty, p. 320, 355, 57. The words "*felonice cepit, murtheravit*" &c. being words of art cannot be supplied by any paraphrase or circumlocution, 2 *Hale*, 185. The offence, says lord *Hale*, must be alledged particularly. 4, *Co.* 40. *Circiter pectus* is not good, p. 44, *Vause's* case. As to the manner, it must be certain and not require argument to make it certain enough for judgment, &c.

Mr. Sol. Gen. *Jones*. The first objection, is abandoned.

As to the 2d. The only necessity for a *venue* is to shew that the Court has jurisdiction of the matter. This is shewn, because the law has fixed the county of *Beaufort* in the jurisdiction of this Court, being a part of the district and the district is mentioned in

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the margin. The offence is charged in *Beaufort* county, and it bursts upon the imagination that *Beaufort* is in the jurisdiction of this Court. In support of this, he cited 4 *Bl.* 301, which he said was a modern authority of a respectable crown law writer, and more to be relied on than the more ancient books.

As to the 3d reason: surely it is enough that he came by his death by one of the modes charged; and he read the Crown Circuit to shew that a mistake of the place is not material, &c. &c.

WILLIAMS, J.—It is not to be doubted, but that by the common law, sufficient certainty must appear. The first reason is waved by reason of the statute of *Henry* the VIIIth.* As to the second, the counsel for the prisoner says that the district is the true *venue* here. It is certainly true, and the niceties spoke of by justice *Blackstone*, as condemned by *Hale* are not such as these; the proper *vill* is not mentioned. As to the knowledge that *Beaufort* county is in *Newbern* district, that don't appear from the indictment. If it had said the district aforesaid, it might do perhaps, but suppose there had been another county, in another state, of the same name, that would not be in the jurisdiction. This therefore is uncertain, and might be more certain. And as to the third objection, there seems to be some weight in it; but the second is so clear, that there is no doubt: and his Honor was therefore clearly of opinion that the indictment was insufficient.

ASHE, J.—The niceties required in ancient times in law proceedings became a grievance and the statutes of *Jeoffails* remedied the abuse in civil cases, but not in criminal. As to the first objection, the statute of *Henry* the VIII, does it away.* As to the second, in making observations of this kind he should only go over those of Judge *Williams*. It is true the district is mentioned, not indeed in the margin, but in the caption: it must certainly also be in the body of the indictment. There is no law or authority that excludes that idea, because it will then appear, that the jury has come from the proper *venue*. It is contended that it is well known that *Beaufort* county is in the district of *Newbern*; but we are not to take our knowledge from any thing but the record. If it had said district aforesaid, it would do, but there might be another county of that name, &c. And as to the third reason, here are two distinct charges in the indictment, it don't charge that he came by his death by both modes; therefore there ought to be a relative. To make this proper, there ought to be a double relative, &c. He read the precedent in the Crown Circuit, and the indictment pursued it: but his Honor observed notwithstanding that it certainly was improperly charged.

And, therefore, judgment was arrested. *Per totam Curiam*.

* *Quære, & vide Lex v. Burridge, 3 P. W. 498.*

STRUDWICK *versus* SHAW.

IN the year 1728, this land was granted to *Foster*; in 1730 *Foster* conveyed it to *Barrington*, who some time afterwards went to England. *Hopkins* settled on the land in 1751, and lived on it thirteen years and died, leaving a son, in 1754. *Barrington* sold it to *Strudwick* who never took possession, nor made continual claim nor brought suit till 1786 or 1787.

Davie's argument for defendant—

In point of law, if the plaintiff ever had any right to recover in ejectment, he has lost it. The nature of title is that it consists of possession, right of possession, and right of property. 2d. *Bl. Comm.* 196, 197, 175, and actual possession may ripen into title. Such title as a man may recover by, in ejectment, must consist of possession and right of possession; at least,* and by neglect a right of possession may be lost, thus one man may be in possession, he who is ousted may have the right of possession, and be entitled to recover in ejectment, but by acquiescing seven years may lose his right, that is to say, unless within that time he enters or brings suit or makes perpetual claim. The law presumes in such case that he in possession had at first a good title, or that since his first entry, he hath acquired one.

It is an old maxim in the law that a man must recover by the strength of his own title, in an ejectment, and not by the weakness of his adversary's. Where a man loses his right of entry, he cannot recover in ejectment; perhaps the writ of right or some other writ might lie in such case. But I do not know of any decisions in this country to that effect. *Runninton* 112. Ejectment competent only where plaintiff may enter within twenty years, 1 *Burr.* 119, per lord *Mansfield*, same doctrine almost in the same words: and possession for twenty year makes a positive right in the possessor, in case a right of possession, and it also takes away the plaintiff's right of possession in this country. If seven years pass without entry or claim the *jus possessionis* is lost. 1715, 27, 12. This is a law of the utmost importance; the object of society is to protect men in their property, and to quiet them in it. This is the very object of entering into society: the case now before the court is the very object of this law. Where owners have deserted their lands and gone away and others not knowing of their appropriation, have taken up the same, settled thereon, and improved them, and remained seven years in possession, surely it would be very *incompatible*, if the could be turned out of possession; this law of ours says that after seven years' quiet possession, no person shall make entry or claim. Our law is copied from that of 12 *Jac.* except with this addition to make it more strong; our law intended to make possession strong

* 2 *Douglasi*, 567.

er towards title than the act of *James* did. Thus must I have said to shew that the decisions in England will apply to our law. Both acts limit from the time that the title or entry shall accrue. The decisions in England, have been uniformly that the right of possession is lost by not entering within twenty years. *Kunnington* 14, 15. Twenty years' adverse possession is not only a negative bar, but also a good title. If defendant had been possessed but one day, yet if the plaintiff had not been possessed within twenty years, then no title in ejectment. *Salk.* 421, twenty years' possession tolls the entry like a descent cast. He may gain the *jus possessionis* by twenty years' possession. To apply these principles, they have not had possession, brought no suit, made no legal claim in seven years, *Runnington* 112. Possession must be proved in the plaintiff within twenty years, 2 *Bl. Comm.* 196, 197. It is not upon the mere right of property that a person can recover in ejectment, it must be upon the *jus possessionis*. *Buller* 302. Twenty years possession tolls the entry. *Buller* 102. None shall enter but within twenty years, and plaintiff shall be nonsuited, if he cannot prove possession within that time, and this must be an actual possession, not a mere constructive one, *Buller* 102, or it must be what the law deems tantamount to an actual possession, as continual claim where the party dares not enter. Cases in *K. Bench*, 16, 503*, *Inst.* 15. I conclude therefore that the plaintiff must prove actual possession within twenty years, or in this country within seven years, and if the law is so in England, much more so ought it to be thus taken in this country, where our act evidently goes further than the act of *James*. And as to the decisions in this country, no case hath ever shaken these authorities; except the case of *Mallet* and *Minus*, in this court, may be thought to have done so, but in reality it does not. For in that case two points were determined, first, when the possession is in fact vacant, he who has a conveyance is deemed to be in constructive possession. Here an adverse possession hath existed ever since the year 1751. If they had made any entry, claim, &c. to prevent the operation we contend for, they should have shewn it in evidence. The third section of our act relates only to the plaintiff's title, not to the defendant, the second relates only to the title of persons in possession, not those out of it: in the whole statute of *James* there is nothing like this section. By the statute of *James*, the writ of right will lie after the *jus possessionis* destroyed: by ours no writ whatsoever will lie afterwards. Had it not been for the second section, a writ of right would have lain in this country. Upon our act there have been a variety of opinions. Some saying that a possession with colour of title was necessary: others that a naked possession only was good and sufficient. In our case if a naked possession only would do, they could not recover in a writ of right: but it is clear in ejectment it is enough for our purpose to be able to say, you have lost your entry by your latches. There is one other point of great importance not before settled in this country. *Heavell* was thirteen years in

possessor, he died and a descent cast upon his son. Such a descent tolls an entry, by the law of England. Five years possession, and a descent cast tolls an entry unless the disseisor hath made continual claim within a year and day after each preceeding claim, *Inst.* 250. p. 255, *sec.* 426, *Gilbert's Tenures*, 18, 19, 35, 36, 37. In the case of persons beyond sea, they must claim within eight years from the accruing of their title, and where the act ever begins to run it shall not be suspended. For then the purpose of the act might be totally frustrated, as if a man has been six years and eleven months in possession; the owner dies, his heir within age; the heir lives to marry three years after his coming to age and he dies, his heir within age: here the limitation would not have effect in the course of sixty or seventy years, and to prove this point he cited *Plowden* 368—72.

More in reply cited *Burr.* 66, to shew the doctrine of seisin and disseisin, and to prove there could be no such thing as disseisin in this country.

The court adjudged the *ius possessionis* was lost by the plaintiff, and ordered a nonsuit.

HALIFAX, April Term, 1796.

IN EQUITY.

JONES'S EXECUTORS *versus* STOKES. *Injunction bill.*

THE defendant pleaded in this case that the process &c. had not been served on him *ten days* before court, as the act of Assembly directs; but it appearing that it had never been served upon him at any time: 1782, 11, 432.

The court, HAYWOOD, J. and STONE, J. ordered the plea to be overruled: because the act only gives the advantage to the defendant for an *illegal* service, but not when there is *no* service at all.

NEWBERN, September Term, 1796.

BETTNER *versus* _____

CASE on a foreign bill of exchange, protested for non acceptance. The defendant suffered a default: on executing the writ of enquiry, a question arose, whether the plaintiff was bound to give notice to the defendant, that his bill had been dishonoured before he could bring suit? and by the Court, the defendant, by suffering a default, has admitted the declaration to the amount of the bill,

Whereupon it was urged in behalf of the plaintiff, that he should recover 15 per cent. damages for costs of protest, &c. and 10 per cent. annual interest, untill the time of recovery. 1741, 16, 79.

But after great deliberation, the Court was of opinion that the plaintiff ought to prove notice to entitle himself to extraordinary interest and damages, and having failed so to do, was only entitled to 6 per cent. and the jury found a verdict accordingly.

Graham for the plaintiff, *Taylor* for the defendant.

M'Coy, J. and STONE, J. present.

KAIGHN & ATTMORE *versus* KENNEDY.

CERTIORARI. At the trial *Davie*, for the plaintiffs, offered to read a deposition taken in Philadelphia.

Moore, for the defendant, objected, unless notice could be proved to have been given to the defendant, of the time and place at which the deposition was taken.

ASHE, J. inclined to think the deposition ought not to be read, unless notice was proved.—But

McCoy, J. said, it had been the constant practice of the superior courts, when a cause from the county courts was tried anew, and a deposition came up with the transcript of the record, to admit it to be read; and to presume due service of the notice and that the deposition had been duly taken, on proof that it had been read below.

Whereupon, by the COURT. Let proof be made of the reading of this deposition below, and it may be read.

Davie offered to read a certificate, which the plaintiff had obtained from the district judge of the U. S. *Sitgreaves*, who, while at the bar, was of counsel for the defendant in this case; stating that the deposition was taken by consent of him and *Caswell*, counsel for the plaintiffs, and that notice was waved.

But *Moore* and *Martin* opposed that evidence, as it was not given on oath.

Davie contended that evidence might be given of an adverse party's declaration—that *Sitgreaves* being the defendant's counsel, his declaration might be given in evidence, with as much propriety as that of the principal. That if it may, evidence of it in writing ought to be received.

But the Court, *ASHE*, J. and *McCoy*, J. unanimously rejected it.

While the plaintiffs' counsel was looking round to discover some person, who could prove what was required of him, one of the jurors looking at the deposition recognized on the back of it, some figures which he had made in casting up the interest, at the trial in the county court; having been a juror there.

Moore objected then, to that gentleman trying the cause now ; as he had already done so once,

On this, the cause was continued ; although *Davie* insisted, very strenuously, that another juror might be sworn.

At September term following, the plaintiffs had a verdict : but

Martin for the defendant, moved for a rule to shew cause why a new trial should not be had, Urging 1, that, improper evidence had been suffered to go to the jury, 2, that, excessive damages had been given.

The rule was granted :

And on the last day of the term, *Graham* for the plaintiffs, moved to have the rule discharged ; on the ground that the defendant, on the argument day, ought to have moved for the rule being made either absolute or enlarged ; that having neglected to do so, he ought to be considered as having abandoned his motion.

But *Martin* and *Badger* contended that this being the last day of the term, no business on the law docket could be taken up : the law having exclusively set apart the three last days of every term, for the dispatch of equity business. 1792, 8, 46.

Graham replied that the rule must be looked upon as having expired : and

Martin and *Badger* held that the defendant, having obtained the rule and served a copy of it, nothing remained to be done by him, until the plaintiffs shewed cause.

That it was the plaintiffs', and not the defendant's duty to move the court : and cited a number of cases out of *Burrows*,

Of this opinion was the court, [*M'Coy J. alone*,] who said, that although it was certainly the duty of the plaintiffs to have applied sooner, and on their having neglected to do so, the rule might be made absolute ; yet as this cause had long been depending, (it having been commenced nine years ago) he would enlarge the rule until next term.

At March term 1795. The rule for a new trial was taken up : and the reasons assigned by *Martin* were :

1. That the declaration contained but the two common counts, for goods &c. sold and delivered at a stated price, and on a *quantum valebant* : yet an agreement signed by the defendant, that interest

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should be paid after six months from the delivery of the goods, was read to the jury, from the deposition taken in Philadelphia : although that agreement was not declared upon—and it was therefore improperly introduced.

2. That excessive damages had been given : interest having been computed from the delivery of the goods.

The Court, ASH, J. and WILLIAMS, J. thought that interest being customarily allowed in Philadelphia in similar cases, it was proper that it should be given in this ; even if there had been no agreement to that effect.

They deemed the second objection a proper one.

The plaintiff remitted the interest, during the first six months ; and had judgment.

NEWBURN, September Term, 1796.

GREGORY *versus* BRAY.

A PPEAL. The transcript of the record was carried up *thirteen* days before the Superior Court. 2, 1777, 2, 84; 314.

The judgment was affirmed, on the second day of the term ; unless cause be shewn to the contrary, on the argument day.

On which day the defendant's affidavit was read, stating that the judgment had been obtained at the last session of Jones county court—that there were but thirty three days between the last day of that session and the first of this term—that defendant was sick a bed on the day on which the transcript was to be carried up—that he came down in a boat, being unable to ride—that he arrived time enough to file the transcript ; but discovered on his landing that his pocket book which contained it, had been accidentally left behind—that he returned immediately home and came back on the next day with the transcript, but was informed it could not be received, it being then *one* day too late—that he came back on the next day to advise with counsel and was directed to file the transcript, which he did—Whereupon he prayed that the cause might be placed on the trial docket.

STONER J. If the Court had any discretion to exercise, this would be a proper case to use it : but the act is positive:

M'Coy, J.—The act of assembly leaves the party in this case without a remedy. It is not in the power of the court to create one for him. It has been often adjudged so.

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The judgment was affirmed absolutely.

Harris and Badger for the plaintiff. *Martin* for the defendant.

NEWBURN, *March Term, 1794.*

THE STATE *versus* GEORGE, A FREE NEGRO.

MR. Solicitor-General *Jones* had drawn a bill of indictment for burglary against the defendant : and at the moment it was about to be sent to the grand jury, and the book was handed to the witnesses :

Martin called the attention of the Court to the table : observing that one of the witnesses about to be sworn, was a negro slave ; that although the defendant was a negro, yet, he being a freeman, it was perhaps improper that a slave should testify against him.

MCoy, J. [*ASHB, J. ascende.*] If there be any thing in the objection, the court will attend to it at the trial.

The slave was sworn, and the bill was found. The prisoner being arraigned, pleaded not guilty ; but made his escape before the day assigned for his trial. See *Cox vs. Dove*, *postea*, p. 43.

NEWBURN, *September Term, 1796.*

SHEPPARD *versus* SALTER.

CASE *sur assumpsit*. The plaintiff went to trial ; proved his debt but could not give evidence to repel the plea of the Statute of limitations : and suffered a nonsuit.

He afterwards offered an affidavit that one of his witnesses, by whose testimony he would have been able to prove a re-assumption within three years, was at his counsel's elbow a little before the cause came on, but was out of the court-house at the time he was called.—Whereupon he prayed that the nonsuit be set aside.

The Court said he ought to have prayed a continuance.

But on his observing that he had thought that by going to trial and satisfying the court, by the testimony of a witness who attended, that he had a good cause of action, and that he failed only on the proof of a re-assumption : the justice of the case being on his side, he would appear entitled to the favour he prayed :

STONE, J. Let the nonsuit be set aside, on payment of full costs.

M'Coy, J. *tacete.*

Davie for the plaintiff. Arnett for the defendant.

NEWBORN, September Term, 1795.

ELLIS'S ADMINISTRATOR *versus* HETFIELD.

COVENANT and *non est factum* pleaded. Martin, for the plaintiff, offered to give evidence of the hand-writing of the plaintiff, who was the only subscribing witness to the specialty; and cited *Godfrey vs. Norris*, 1 *Strange*, 34.

This was objected to by Slade, for the defendant: but

Admitted by the COURT, WILLIAMS, J. and HAYWOOD, J.

And, proof having given of the subscribing witness's hand-writing:

WILLIAMS, J. required that the signature of the defendant should also be proved.

HAYWOOD, J. *tacete.*

It was accordingly done, and the plaintiff had a verdict.

NEWBORN, March Term, 1795.

HARVEY *versus* JONES & BARFIELD.

CASE on a promissory note. The plaintiff proved that the subscribing witness was not in the state, and offered to give evidence as to his hand-writing.

But it appearing that the witness resided in the state, and was occasionally absent:

The Court, ASHE, J. and WILLIAMS, J. doubted of the propriety of admitting proof of the hand-writing: saying that the testimony of that witness might be obtained at another term—that a commission might be taken and his deposition procured while he was in the state, and read, if he happened to be abroad at the time of trial.

They recommended it to the counsel of both parties to consent to a juror being drawn.

And on their agreeing thereto, it was accordingly done.

Martin for the plaintiff. *Badger* for the defendants.

NEWBURN, September Term, 1796.

BORDEN *versus* NASH's ADMINISTRATOR *de bonis non*.

THE defendant omitted to plead *plene administravit*, and judgment being obtained, the plaintiff took out an execution *de bonis testatoris*. On *nulla bona* being returned, he took out an execution *de bonis propriis*.

The defendant prayed and obtained a writ of *superfedeas quia revocavit emanavit* to the last execution. And

At this term *Slade* and *Graham*, for the plaintiff, moved to have the *superfedeas* set aside.

Martin for the defendant, contended that the execution had irregularly issued *de bonis propriis*, before a *devastavit* had been returned—and cited *1 Morgan's Vade Mecum*, 210, 211.

STONE, J. The practice is generally so laid down in the books, and the authorities are all that way; but the courts in this country have taken a shorter road—and whenever the defendant does not plead *plene administravit*, they have always permitted the plaintiff on *nulla bona* being returned on the execution the *bonis testatoris*, to levy the debt *de bonis propriis*, without waiting for the return of a *devastavit*.

M'Coy, J. concurring:

The *superfedeas* was set aside.

NEWBURN, September Term, 1796.

DANIEL *versus* COBB's EXECUTOR.

SCIRE *facias* to revive an action of detinue: *Davis*, for the defendant, pleaded, in abatement, that this action could not be revived against representatives.

But the Court, M'Coy, J. and Stone, J. overruled the plea: they said it had been often adjudged that this action could be revived.

A case was cited in which the same principle was held, respect.

ing the action of *trouer*, at *Wilmington Superior Court*.

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Harris for the plaintiff, *Davie* for the defendant.

NEWBERN, *March Term*, 1796.

COX *versus* DOVE, A FREE NEGRO.

TRESPASS *quare clausum fregit*, and *non culpabilis* pleaded.
To prove the entry, a negro slave was called and offered to be sworn.

But, the Court [WILLIAMS, J. saying he never heard such a thing asked: HAYWOOD, J. *tacente*] refused to admit the witness: although the defendant was stated to be a negro. 2, 1777, 2, 42, 307.

The case of *The State vs. George*, *ante*, p. 40, was cited: but such argument was not offered by the plaintiff's counsel; there being other witnesses, attending to prove the fact intended to have been proved by the slave. He having been offered only to come at the opinion of the judges.

Slade, for the defendant, offered to read in evidence, a letter from the plaintiff to the defendant authorising him to tend turpentine trees on the premises.

Martin, for the plaintiff, objected to this: on the ground that if the defendant meant to avail himself of the plaintiff's licence, he ought not to have denied the entry, which he had done by pleading *non culpabilis*; at all events he ought to have pleaded *justification*. He cited *Co. Litt.* 282.

The COURT, HAYWOOD, J. and STONE, J. nevertheless permitted the letter to be read; on the authority of a case cited out of *Buller's Nisi Prius*, 90. *Halton & Neale, per Jones, C. J.* 1683.

The plaintiff proved a trespass committed by cutting timber, and had a verdict.

NEWBERN, *September Term*, 1794.

STATE *versus* GROVE.

INDICTMENT for arson. Mr. Solicitor-General Jones, praying that a witness might be sworn.

Davie, who was of counsel for the prisoner, asked what use was expected to be made of his testimony? whereupon the Solicitor

General informed the court that the gentleman at the table, the magistrate who had committed the prisoner : and he was introduced to give evidence of the prisoner's confession or admission, previous to his commitment.

The magistrate was asked whether he had committed the examination of the prisoner to writing, and answered in the negative.

Davie, for the prisoner. *Parol* evidence of the prisoner's examination is inadmissible. It is required by 1715, 16, 11, that the examination of the party be recorded.

Of which opinion was the COURT.—

Whereupon Mr. Solicitor-General wished the magistrate to sit down at the table and make a record of the examination, that it might be read.—but

Davie held it was now too late. The examination ought to be committed to writing within *two days*, after the taking of it. It is so required by 2 & 3 P. & M. 10, 284.

Mr. Solicitor-General. The statute is not *now* in force; the act of assembly, already quoted, has repealed it.

The COURT, M'Coy, J. *alone*. There being no words of repeal in the act, and the statute being *in pari materia*, they ought to be taken as one law.

The magistrate not being admitted to be sworn,

Mr. Solicitor-General entered a *vol. pro.* and the prisoner was discharged.

NEWBURN. *September Term, 1794.*

THOMEGUEX *versus* BELL.

THE defendant offered to prove a set-off, under the book debt act. 1756, 4, 171.

The plaintiff's counsel opposed it, on the ground that this act being in direct contradiction of one of the most wholesome maxims of the common law, ought to be strictly construed. That *plaintiffs* alone were mentioned in it : and it ought not to be extended to *defendants* by implication.

He cited a saying of Lord Coke, in *Slade's case*, 4. *Rep.* 95.—*Jurare in propria causa est sapientissimo hoc seculo, precipitium diaboli.*

detrudenda miserorum animas ad infernum.

By the Court, M'Coy, J. *alone*. *Defendants* have been uniformly admitted to the benefit of this act. The objection has never been made before: the practice of the court has been the other way. Let the defendant be sworn.

He proved his set-off, which consisted of a tavern bill, partly on the testimony of a witness, and partly, a sum under £. 30, by his own oath.

To the set-off there was a replication of the act respecting ordinances, 3, 179, 10, 16, 392: which was insisted on by the plaintiff.

The Court, M'Coy, J. *alone*, in the charge, told the jury it was doubtful whether the act contemplated a case like this, *viz.* that of a person constantly residing in a town, and occasionally calling at a tavern.—His Honor said, the act was perhaps intended only to operate in case of feasting men, and transient persons. The jury would do well to consider of this.

They allowed the set-off.

Martin, for the plaintiff. *Slade*, for the defendant.

* * At the succeeding term, the first question was incidentally mentioned from the bench, in another cause.

ASHE, J. inclined to think the book debt act did not admit of a liberal construction, as to admit *defendants* to the benefit of it.

WILLIAMS, J. seemed clearly of the contrary opinion.

NEWBERN, September Term, 1796.

EAVES & EAVES *vs.* EX'R OF STARKEY, EX'R OF EAVES.

ACCOUNT. The jury found the following special verdict, *viz.*

- "That *Edward Starkey* was executor of *Edward Starkey*, who
- "was executor of *Richard Eaves*. That *Edward Starkey*, the first
- "testator, came to the possession of sundry negroes, as executor
- "of *Richard Eaves*, hired them out, and received the hire."
- "That the defendant is the receiver of the plaintiff."
- "Subject to the opinion of the court, on the two following
- "questions."

"1. Whether an action of account lies against the executor of an executor?"

"2. Whether it can be sustained to charge an executor as bailiff, or receiver of legacies?"

The COURT, WILLIAMS J. and HAYWOOD J. gave judgment for the defendant, on the second question.

They gave no opinion on the first question—it being unnecessary in this case. See 4. Ann, 16, 37, 39+.

Slade for the plaintiff, *Graham* for the defendant.

NEWBURN, *March Term, 1796.*

GOODRIGHT ON THE DEMISE OF SHEPPARD *vs.* TAYLOR.

ON a question for the opinion of the court, respecting the taxation of costs, it was determined,

By the COURT, HAYWOOD, J. and STONE, J. That the surveyors are entitled to receive 20j. per day, while on the premises, making the plots, &c. but while attending the Court, where their attendance is necessary, the common allowance of witnesses.

The special jurors are to be allowed, while on the premises, 8j. per day: and while at Court, in the Superior Court, the same allowance. But, in the County Court, nothing. 1786, 13, 583.

NEWBURN, *September Term, 1792.*

DALZELL'S ADMINISTRATOR *versus* STANLY'S EXR.

THIS was an action upon the case, on a promissory note of the testator.

At the appearance term, *Moore*, who had been for many years employed by *Stanly* in all his suits, and also, after his death by the executor, entered his appearance, and pleaded the general issue, although no declaration had been filed.

At *March* term last, *Turner*, the executor, came into court, in person, with an affidavit stating that no declaration had been filed, and moved to have the suit dismissed, according to the act of assembly. 1786, 14, 5, 585.

M'Coy, J. who was alone on the bench, refused to determine the motion, on account of its being a point of argument, which requires the presence of two Judges. 2, 1777, 2, 2, 297.

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His Honor directed the affidavit to be filed, and the motion to be laid over for argument at the next term.

And now, at this term, *Wood*, for the defendant, argued that the cause ought to be dismissed for want of a declaration : notwithstanding the plea in chief : which, there being no declaration for it in answer, must be considered as a nullity. But

It was answered by *Davie*, and

Resolved by the Court, *WILLIAMS, J.* and *McCoy, J.* that the motion is in the nature of a plea in abatement, and cannot be more moved :

That, if this were a plea in abatement, it must not only have been put in at the first term, if at all ; but it would be waived by the plea in chief.

That as it is a summary motion, it is entitled to no better treatment.

It was said to have been so resolved by the Judges in some other case.

* * * There was another suit between those parties, where the same motion was also made, and in which it had the like fate.

STATE *versus* SHEPPARD.

[INDICTMENT for an assault and battery. At the trial the defendant prayed a continuance, on account of the absence of a material witness.

He was asked what that witness would prove ? and on his answering that he intended to prove by the testimony of that witness that the prosecutor had given him very great provocation.

By the Court, *ASHZ, J.* and *WILLIAMS, J.* this will only go in mitigation of the fine. Let the cause be tried, and if there be a verdict against you, we will postpone giving judgment until next term ; in order that you may have the benefit of the testimony of your witness.

The cause was tried, and there being a verdict against the defendant. He was bound over to the next court.

Ex relatione Arnett.

DEN, on the demise of BAYARD & WIFE, vs. SINGLETON.

EJECTMENT. This action was brought for the recovery of a valuable house and lot, with a wharf and other appurtenances, situate in the town of *Newbern*.

The defendant pleaded *not guilty*, under the common rule.

He held under a title derived from the state, by a deed, from a Superintendent Commissioner of confiscated estates.

At May term 1786, *Nash*, for the defendant, moved that the suit be dismissed, according to an act of the last session, entitled, *as act, to secure and quiet in their possession all such persons, their heirs and assigns, who have purchased or may hereafter purchase lands and tenements, goods and chattels, which have been sold or may hereafter be sold by commissioners of forfeited estates, legally appointed for that purpose, 1785, 7, 553.*

The act requires the Courts, in all cases where the defendant makes affidavit that he holds the disputed property under a sale from a commissioner of forfeited estates, to dismiss the suit on motion.

The defendant had filed an affidavit, setting forth that the property in dispute had been confiscated and sold by the Commissioner of the district.

This brought on long arguments from the counsel on each side, on constitutional points.

The Court made a few observations on our constitution and system of government.

ASHE, J. observed, that at the time of our separation from Great-Britain, we were thrown into a similar situation with a set of people ship-wrecked and cast on a maroon'd island—without laws, without magistrates, without government, or any legal authority—that being thus circumstanced, the people of this country, with a general union of sentiment, by their Delegates, met in Congress, and formed that system or those fundamental principles comprised in the constitution,—dividing the powers of government into separate and distinct branches, *to wit*, the legislative, the judicial and executive, and assigning to each, several and distinct powers, and prescribing their several limits and boundaries: this he said without disclosing a single sentiment upon the cause of the proceeding, or the law introduced in support of it.

CURIA ADVISARE VULT.

At *May* term, 1787, *Nash's* motion was resumed, and produced very lengthy debate from the bar.

Whereupon the COURT recommended to the parties to consent to a fair decision of the property in question, by a jury according to the common law of the land, and pointed out to the defendant, the uncertainty, that would always attend his title, if this cause should be dismissed without a trial; as upon a repeal of the present act (which would probably happen sooner or later) suit might be again commenced against him for the same property, at the time when evidences, which at present were easy to be had, might be wanting. But this recommendation was without effect.

Another mode was proposed for putting the matter in controversy on a more constitutional footing for a decision, than that of the motion under the aforesaid act. The court then, after every reasonable endeavour had been used in vain for avoiding a disagreeable difference between the Legislature and the judicial powers of the state, at length with much apparent reluctance, but with great deliberation and firmness, gave their opinion separately, but unanimously for overruling the aforementioned motion for the dismissal of the said suits.

In the course of which the Judges observed, that the obligation of their oaths, and the duty of their office required them in that situation, to give their opinion on that important and momentous subject; and that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the state, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.

That they therefore were bound to declare that they considered, that whatever disabilities the persons under whom the plaintiffs were said to derive their titles, might justly have incurred, against their maintaining or prosecuting any suits in the Courts of this state; yet that such disabilities in their nature were merely personal, and not by any means capable of being transferred to the present plaintiffs, either by descent or purchase; and that these plaintiffs being citizens of one of the United States, are citizens of this state, by the confederation of all the states; which is to be taken as a part of the law of the land, unrepealable by any act of the General Assembly.

That by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all: that if the members of the General Assembly could do this, they might with equal authority, not only render

themselves the Legislators of the state for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.

But that it was clear, that no act they could pass, could by any means repeal or alter the constitution, because if they could do this, they would at the same instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established. Consequently the constitution (which the judicial power was bound to take notice of as much as of any other law whatever,) standing a full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same at mult of course, in that instance, stand as abrogated and without any effect.

Nesb's motion was overruled.

And at this term the cause was tried.

Both the plaintiffs and the defendant admitted the title of the premises to have been in *Samuel Cornell*, Esq. at and before the time when the independence of this state commenced.

The case appeared to be this: *Mr. Cornell*, once an inhabitant of *Newbern*, leaving his family, together with the premises in question, and a variety of property in this town, took shipping on the 19th of August 1775; and went to Great-Britain, where he continued till some time in the latter part of the year 1777, when he came to *New-York*, then occupied by a British garrison; and as a British subject came from thence and arrived in *Newbern*, on the 11th of December 1777, and under the protection of a British flag.

His principal design, in coming to this state at that time, was to take his wife and family with him, to reside under the British government, if he did not find our new government agreeable to his wishes. Not being pleased with the appearance of things here, and thereupon preparing to leave the state, and to carry with him his wife and family, he executed on board the vessel he came in, a deed to his daughter, one of the plaintiffs (under which they claim) for the premises in question, on the 19th of December 1777.

This deed for the purpose of execution had been handed to him without a date, and being asked what date he chose it should bear, he hesitated and said he would look at the copy of a bill which was then in his possession, which bill he understood to be on its passage in the legislature, for confiscating the property of all persons of his description, who should not within a limited time come into this state, and be made citizens thereof, which bill afterwards in the same session passed into a law. After looking at the aforesaid copy of that bill, he chose that the deed should bear date on the 11th of the same month, being the day he arrived in the harbour of *Newbern*; which deed was accordingly dated that day. After which *Mr. Cornell* returned with his family from this state, and from

thenceforth lived and died a British subject, under the British government.

The Court, ASH J. SPENCER J. and WILLIAMS J. gave their opinion *seriatim*, but unanimously.

They observed that the cause turned chiefly on the point of *allegiance* in Mr. Cornell. For this gentleman having from his birth to the time of his death, been always a British subject, and having always lived under the British government, he owed allegiance to the King of Great-Britain, and consequently was never a citizen of this, or any other of the United States, nor owed allegiance there to. For when here, at the time of the transaction aforementioned, he was under the protection of a British flag. That he was therefore, in contemplation of law, as much an *alien*, and at the time of executing the deed; and, from the time of our independence as much an *alien ENEMY*, as if we had been a separate and independent nation, for a number of years or ages before the commencement of the war which was then carried on.

That it is the policy of all nations and states, that the lands within their government should not be held by foreigners. And therefore it is a general maxim, that the allegiance of a person who holds and ought to be as permanent to the government who holds it, as the tenure of the soil itself. That therefore by the civil, as well as by the common law of England, *aliens* are incapacitated to hold lands. For that purpose the civil law has made the contracts with *aliens*, void. The law of England, which we have adopted, allows them to purchase, but subjects them to forfeiture immediately; and does not allow an *alien ENEMY* any political rights at all.

That the premises in question, upon these invariable principles of law, could not from the time our government commenced, have been held by Mr. Cornell; because that in consequence of his owing allegiance to the state, he had no capacity to hold them, and according to the letter of the law of the land, they must have consequently been forfeited to the sovereignty of the state. That the act of confiscation, in which Mr. Cornell was expressly named, and more particularly the act which especially directed the sale of the very premises in question, must have been at least as effectual in vesting them in the state, as any *office found*, according to the practice in England can be, for vesting any forfeited property in the King.

That the circumstances and limited privileges of persons who were sent out of this state under a particular act of our General Assembly, are not applicable to this case. That the case in *Vattel*, of the majority of the inhabitants of any country deliberately dissolving their old government, and setting up a new one, is neither in reason, nor in the most essential circumstances, any ways similar to his case. That *Calvin's* case reported in *Coke*, does by no means reach the leading and characteristic circumstances of this case.

The jury found a verdict for the defendant.

Iredell, Johnston, and Davie for the plaintiffs. *Moore and Nash* for the defendant :

* * On the decision of this cause, twenty-seven others depending in the same court, and subsisting upon similar, or less substantial grounds, were all swept off the docket, by nonsuits voluntarily suffered.

Ex relatione SPENCER, J.

NEWBERN, *September Term, 1795.*

WILLIS *versus* BROWN'S EXECUTORS.

DAVIE for the plaintiff, moved that a commission *de bene esse* might be read upon the plaintiff's affidavit, that the deponent was sick and unable to attend.

The defendant objected to this : and

By the Court, WILLIAMS, J. and HAYWOOD, J. A party cannot entitle himself, by his own affidavit, to introduce this weaker kind of evidence. The disability of the deponent to attend the Court must be proved by indifferent testimony.

And the deposition was set aside.

NEWBERN, *September Term, 1795.*

MOORING *versus* STANTON.

CASE, on a promissory note, the consideration of which appeared to be money paid by the plaintiff to a third person, for money lost at gaming by the defendant,

On a plea of the statute of gaming. 1788, 5, 633.

HAYWOOD, J.—Money lent to play with, or to pay, at the time of loss, is not recoverable. But it is otherwise of a gaming debt paid by a third person, at the request of the loser.

NEWBERN, *November Term, 1780.*

GORHAM & WIFE *versus* ———.

PETITION. The following case was reserved for the opinion of the Court, *viz.*

"John Speir of Pitt county, in his last will and testament, among other things, bequeathed as follows, to wit :

"Item, I give and bequeath all the rest of my negroes and their increase, to be equally divided among my children, the survivor or survivors of them, and their heirs forever.

"The testator died, leaving his wife and three children, two of the children, viz. William and Elizabeth, died infants and under age.

"The question is, whether the mother (*Penelope*, now wife of *James Gorham*) upon the death of the said two children, was entitled to any, and if any, what part of the said children's share of the legacy abovementioned?

"We agree to submit the above question to the decision of the court, and that they may thereupon make such decree upon the above petition, as to them shall seem just.

"JAMES IRVDELL, for the plaintiff.

"WILLIAM HOOPER, for the defendant.

"*Newbern, November 22, 1780.*"

Whereupon the COURT, ASHE, J. SPENCER, J. and WILLIAMS, J. did determine, that upon the death of the first child, the mother was entitled to an equal share of the said estate of such child, with the two surviving children : and that upon the death of the other child who is deceased, she was entitled to an equal share of said estate of such deceased child, with the surviving one ; and that a division of said estate be made accordingly.

November Term, 1778.

THE STATE *versus* SMITH.

THE defendant, at *November term, 1778*, was indicted for murder : He pleaded *not guilty*, and the jury found him *guilty of MANSLAUGHTER*.

On being asked what he had to say, &c. he prayed the benefit of clergy—which being granted,

The Court gave judgment that he be burnt on the brawn of his left thumb, and discharged :

But on cause shewn, the Court, ASHE, J. and SPENCER, J. suspended the execution of this sentence until next term.

He was bailed and entered into recognizance, himself in the sum of £. 3000, and his two securities in that of £. 1000 each.

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At *May* term last, the COURT, (SPENCER, J. *alone*) met; but the small-pox raging then in *Newbern*, no business was done, and the Court was adjourned, to the first day of the Court in course.

And at this term, he was brought to the bar, and pleaded a pardon from the Governor, which being read and inspected by the Court, ASHE, J. and SPENCER, J. was allowed, and

THE PRISONER DISCHARGED.

* * The same indulgence has since been shewn to the defendant at *Wilmington*, in the case of the State vs. *Snead*, and at *Newbern*, in that of the State vs. *Hyfan*.

NEWBERN, *November Term*, 1778.

WRENFORD *versus* GORDON.

REPLEVIN. *Nash*, for the defendant, moved that the writ be quashed; it having irregularly issued.

It appeared by affidavits filed, that the defendant and her late husband had been in quiet possession of the slave, who had been taken in pursuance of this writ, for several years. And that it was merely in order to try the right of the parties to him that the writ had been sued out.

By the Court, SPENCER, J. *alone*. The taking out of this writ for this purpose, is irregular, wrongful and oppressive. Let it be quashed.

Nash afterwards moved for and obtained a writ *de returno habenda*. Upon which the slave was restored to the defendant, *ut audiui*.

November Term, 1784.

GOODRIGHT *on the demise of* M'ILWEAN *versus* SHINE.

EJECTMENT. At the last term, judgment was taken by default against the casual ejector, and a writ of *habere facias possessionem* awarded and executed, and now the judgment was set aside on payment of full costs; *Shine* making himself a defendant, and agreeing not to delay the trial.

And on motion of ——— his counsel,

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The Court directed a writ to issue to the sheriff, to reinstate ~~him~~ in the possession of the premises.

NEWBERN, March Term, 1791.

STANLY'S EX'R. *versus* HAWKINS.

At May term, 1790, the jury found, in this case the following special verdict, to wit:

"The jury find that the defendant as commercial agent for the State of North Carolina, did purchase of John W. Stanly, and Co. on the 3d of June, 1780.

One Hhd. rum, 110 galls, at £. 50;	£. 55 00
On the 27th 112 lb. coffee, at £. 10, 8.	1164 16
2 1/4 lb. of Castile soap, at £. 8,	22
	£. 6686 16

Amounting in the whole to	£. 6686 16
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Equal as per scale of depreciation, to	£. 89 3
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And on July 8th, of the same year, seven " hhd. rum, containing 800 galls: at " £. 48,000, equal as per scale of de- " preciation, to	} £. 533 6 8
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The debit amounting in the whole to	£. 622 9 8
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"They also find that the said Benjamin Hawkins hath paid to the plaintiff, on the 6th day of July, 1780, a warrant for £. 20,200, equal per scale to £. 224 8 10, and 580 dollars in specie, leaving a balance due to the plaintiff, of one hundred and sixty-six pounds and ten pence.

"Whether the law be for the plaintiff or defendant, upon the facts aforesaid, the jury pray the advice of the court. If the law be for the plaintiff, they find the defendant did assume and assents the plaintiff's damage to one hundred and sixty six pounds and ten pence: if for the defendant, they find the defendant did not assume."

And at this term; the Court, ASHE, J. and WILLIAMS, J. gave judgment for the defendant:

NEWBERN, September Term, 1791.

SIMPSON *versus* CRAWFORD.

JONES, for the plaintiff, moved for leave to alter the *capit*, which had been returned "*executed*." He observed that it had

been issued by the clerk; that the instrument on which the *fi* was brought was a *deed*, and the *capias* had been filled up in *cash* while it ought to have been in *covenant*.

The defendant was not in court, and none of the gentlemen of the bar present, was employed for him.

The COURT, ASHE, J. SPENCER, J. and WILLIAMS, J. made no observation, but permitted the *capias* to be altered.

NEWBURN, *March Term, 1792.*

HENRY *versus* SMITH.

HENRY had sued Smith in the County Court of Craven. Smith neglected giving bail, and was committed.

Woods, for the defendant, moved to have him brought into court, suggesting that he was a minor, and that the property for which he was sued had not been delivered to him.—Which,

The COURT, SPENCER, J. and M'Coy, J. granted.

Whereupon he appeared—and the Court, not being satisfied by inspection that he was a minor, a witness was sworn, and deposed that the defendant was a minor of about the age of seventeen.

And he was, on Woods' motion, discharged.

NEWBURN, *September Term, 1796.*

IN EQUITY.

COOR'S EXECUTORS *versus* PAGE.

IT was resolved by the COURT, M'Coy, J. and STONE, J. that in bills to perpetuate testimony, if the defendant makes no defence, either by plea, demurrer or answer, he is not entitled to have a Solicitor's fee taxed in the bill of costs.

Baker for the complainant. Taylor for the defendant.

NEWBURN, *September Term, 1796.*

IN EQUITY.

SHEPPARD *versus* COLLINS, & AL.

AT *March term* last, the complainant obtained a rule that the defendant answer within four months.

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The answer not having been filed within that period, *Baker*, for the defendant, at this term prayed that it might now be received.

This was strenuously opposed by *Woods*, for the complainant, who insisted that the defendant should at least pay costs.

But the COURT, *McCoy*, J. and *STONE*, J. ordered the answer to be received.

NEWBERN, *May Term*, 1787.

DOE on the demise of *CLEARY* versus *WRENFORD*.

EJECTMENT. The jury found the following special verdict,
viz.

"THE jury find that the premises in question were vested in *Timothy Cleary* late of *Newbern*, deceased, in fee, that the said *Timothy* died intestate, without issue, on or about the month of *September* 1775; and that *Simon Cleary* his heir at law, the lessor of the plaintiff was then an inhabitant of the kingdom of *Ireland*: that about the month of *December* 1777, an act of the general assembly of this state was passed, entitled,

An Act for confiscating the property of all such persons as are inimical to the United States, and of such persons as shall not, within a certain time therein mentioned, appear and submit to the State whether they shall be received as citizens thereof, and of such persons as shall so appear and shall not be admitted as citizens, and for other purposes therein mentioned." 2, 1777, 17, 341.

"I. WHEREAS divers persons who have heretofore owned and possessed lands, tenements and hereditaments, and also moveable property in this state, have withdrawn themselves from the same, and attached themselves to the enemies of the United States of *America*; and also divers persons who have withdrawn to places beyond the bounds of any of the United States, in order to avoid bearing their proper and equal part in defence of the freedom and independence of the same; and also divers persons who having been beyond the bounds of the United States at the beginning of the present war, have failed to return and unite their efforts for the common defence of *American* liberty; and it is expedient and just that every person for whom property is protested in any state should be and appear within the same, or join in defence thereof whenever the same is threatened or invaded; and it is also just that a reasonable time be given for such as have it in their power to allege favourable or mitigating circumstances to induce this state, ever attentive to the rights of natural justice, and ever-ready and willing to receive to grace and favour all who are sincerely attached to liberty, to receive them as citizens, and re-

“from them all the possessions which were managed within
 “the limits of the said state, or in the service of the state of
 “New Brunswick, and all persons residing in the service of the state,
 “and in the service of the state, and in the service of the state,
 “person within the state, and all and every person, male and female,
 “born within the state, and all and every person, male and female,
 “and person who was on the 1st day of July in the year one
 “thousand seven hundred and seventy-eight, and who at the said day was
 “absent from the state, and every part of the United States, and
 “who is still absent from the state, or who has at any time during
 “the present war attached himself to, or aided or abetted the ene-
 “my of the United States, or who has withdrawn himself from
 “the service of the United States after the war aforesaid, and all
 “persons beyond the limits of the United States shall and are here-
 “by declared to be considered as the citizens of this state: unless such
 “person shall, at the next General Assembly which shall be held
 “after the 1st day of October, in the year one thousand seven hun-
 “dred and seventy-eight, appear, and be by the said Assembly ad-
 “mitted to the privilege of a citizen of this state, and restore to
 “the possessions and property which to him once belonged within
 “the state.”

“III. *Provided*, That this act shall not extend to such persons
 “as are, or have been actually employed in the service of the U-
 “nited States, or any of them, and have not deserted to the enemy,
 “or treacherously violated their trust, as are imprisoned, or confined
 “sind, or under the age of twenty-one years.”

“IV. *And provided also*, That nothing herein contained shall be
 “construed to give permission to such persons as have removed them-
 “selves, or have been removed under the compulsive authority of a
 “ny law of this state, or who have removed themselves to avoid tak-
 “ing the oath of allegiance to this state, to return thereto, or to
 “avoid any sales of lands, tenements, hereditaments, or moveable
 “property, by such persons *bona fide* made before their departure,
 “pursuant to an act of Assembly, passed at the last session of this as-
 “sembly, entitled, “*An act for declaring what crimes and practices*
 “*again the state shall be treason, and what shall be misprision of treas-*
 “*on, and providing punishments adequate to crimes of both classes, and*
 “*for preventing the danger which may arise from persons disaffected*
 “*to the state.”* 1, 1777, 3, 284.

“AND the aforesaid jury also find that in the month of November,
 “1784, the following act, entitled, *An act to remove all disabili-*
 “*ties from Simon Cleary, and others therein named*, was made and
 “passed in the words following, viz. 1, 1784, 34, 145.”

“WHEREAS Timothy Cleary (otherwise Clear) late of the town
 “of Newbern deceased, departed this life on or about the month of
 “September, in the year of our Lord one thousand seven hundred and
 “seventy-five, without issue, possessed of a considerable real and
 “personal estate, the real estate descending to his eldest brother and
 “heir at law Simon Cleary, and the personal estate after deducting

"the distributive share of the widow to the said *Simon Cleary*, *Patrick Cleary*, *Esther Beetle* widow, otherwise *Cleary*, *Thomas Connor* and *Margaret* his wife otherwise *Cleary*, and *Mary Cleary*, single woman, brothers and sisters of the said *Timothy*; and whereas the said brothers and sisters of the deceased, were inhabitants of the kingdom of *Ireland* and other parts without the limits of the United States, by reason of which the commissioners of confiscated estates for the county of *Craven* have seized and sold the greatest part of the said estate which formerly belonged to the said *Simon Cleary*, *Patrick Cleary*, *Esther Beetle*, *Thomas Connor* and *Margaret* his wife, and *Mary Cleary*; the said *Simon*, *Patrick*, *Esther*, *Margaret* and *Mary*, nor any of them, not appearing at the first General Assembly which was held after the first day of *October*, one thousand seven hundred and seventy eight, agreeable to an act commonly called the confiscation act, passed in *December* one thousand seven hundred and seventy seven: and whereas the said *Patrick Cleary* hath applied to this present General Assembly and offered testimonials to induce a belief that he hath made several attempts to come to this state during the war, properly impowered by his brothers and sisters; the first of which attempts appears to be on or about the latter end of the year one thousand seven hundred and seventy six, but was each and every time unfortunately taken by privateers: and whereas the General Assembly have resolved that the several claimants of the estate of the said *Timothy* are entitled to relief, and have voted that they shall receive out of the public treasury, the amount of the sales of the said estate, and it is necessary that they should be further relieved by enabling them or some of them to commence an action or actions for the recovery of such part of the estate as hath not been sold, and the rents, issues and profits thereof, and of such things in action, if any, as as may be in the hands of individuals.

"II. Be it therefore enacted, by the General Assembly of the state of *North-Carolina*, and it is hereby enacted by the authority of the same, that it shall and may be lawful for the said *Patrick Cleary* to sue for and obtain letters of administration on the personal estate of his deceased brother, unadministered by *James Coor*, *John Hawks* and *David Barron*, and the survivors of them, and as administrator to commence and prosecute such suit and suits as may be necessary and in the name of the said *Simon Cleary*, other the heir or heirs at law of the said *Timothy*, to commence and prosecute to final judgment any suit or suits either in law or equity which may be necessary for the recovery of any of the real estate which was of said *Timothy Cleary*, any law to the contrary notwithstanding.

"AND the aforementioned jury do further find that the premises in question were not sold by any commissioner of confiscated property, before the passing of the last recited act."

"AND upon the whole, if the law is for the plaintiff, they find the defendant guilty of the trespass and ejectment, as laid in the claim.

"tiff's declaration, and assess six-pence costs: if for the defendant they find the defendant not guilty."

Whereupon the COURT, ASHE, J. WILLIAMS, J. and SPENCER, J. after having considered the special verdict, directed judgment to be entered for the defendant.

MacLaine for the plaintiff. ————— for the defendant.

NEWBURN, *March Term, 1795.*

STANLY'S EXECUTOR *versus* GREEN.

THIS was an action of debt on a sealed note, to which the defendant pleaded on the docket among other pleas, "*set off*," but no plea was drawn out at large and filed.

On the trial the defendant's counsel produced as evidence of *set-off*, a letter from one *Hooper* in *South-Carolina*, to the defendant, dated about the year 1785, in which he acknowledged that he had received gold for the benefit of the defendant, a number of certificates, and in the same letter stated the proceeds of the sale.—The defendant's counsel offered at the same time to prove that the real interest of the note was in *Hooper*, and that *Stanly's* executor was merely a nominal plaintiff.

To this evidence two objections were taken by the plaintiff's counsel. 1st. That as *Stanly's* executor appeared in the record to be the real plaintiff and only person entrusted in the note, no evidence could be received to contradict the record, nor prove the property of the note to be in any other person, and consequently no debt, except one due from *Stanly* could be set against it. 2d. That the demand set up by *Hooper* was barred by the statute of limitations, and was not such an existing debt as would support a suit, and therefore would not be set off.

But these objections were both overruled by the Court, ASHE, J. and WILLIAMS, J. who said that if the interest of the note was in *Hooper*, then demands of the defendant against him might be set up against it, for the debts were in fact mutual—that as the defendant had pleaded his *set-off*, the plaintiff ought to have replied the statute of limitations—and that a plaintiff can no more oppose this statute to a defendant's pleas without replying it, than a defendant can to the plaintiff's declaration without pleading it.

The defendant's counsel was proceeding to prove that the interest of the note was in *Hooper*, when the fact was admitted by the plaintiff's counsel, and the *set-off* allowed.

Woods for the plaintiff. *Badger* for the defendant.

Quere of the propriety of this decision. 1. Because by no construction of any part of the record, could it be inferred that *Hooper* was concerned in interest. The fact ought to have been set forth in the plea and although it is not the general practice of the bar in this state, to draw out the pleadings at full length; yet every material fact which cannot be intended in the ordinary form of the plea, ought at least to be suggested on the docket. 2. Because it is reported that the Superior Court setting at *Edenton* had before determined that the words "*set off*," written on the docket should be considered as a notice of set off only, and that all objections to the demand set up, might be taken at the trial.

Ex relatione Woods.

NEWBURN, March Term, 1795.

REGULA GENERALIS.

BY consent of the bar, and with the assent of the COURT, *It is Ordered*, That commissions to take testimony *de bene esse*, where witnesses reside within the state: and *absolute* when without the state, may issue in all cases.

Reasonable notice to be given the adverse party.

NEWBURN, September Term, 1796.

IN EQUITY.

BIZZEL *versus* BURKE.

IN this suit, it was ruled by the Court, M'Coy, J. and Stone, J. that upon the injunction dissolved, and the bill continued as an original, if the complainant neglects to take out depositions or subpoena witnesses, the suit is discontinued, at the second term after the injunction dissolved.

Ex relatione STANLY, Magistri.

NEWBURN, March Term, 1796.

IN EQUITY.

PATTERSON *versus* SAVAGE's EX'RS.

THE COURT, HAYWOOD, J. and Stone, J. held that, if the death of a party is suggested, the suit goes off at the second term after the suggestion.

Wisherpoon for the complainant. *Baker* for the defendant.

REGULA GENERALIS.

UPON completing depositions, the party taking the same may give notice to the opposite party to attend before the Master, for the purpose of being present or proving the notice given of the taking of such deposition—and the Master upon the return of the notice served, is to examine the evidence offered, respecting service of notice and also hear and consider any objection made against the same. If the Master shall be of opinion that the notice was duly served, on the deposition properly taken, he shall indorse his judgment respecting the same upon the deposition, and make a memorandum thereof upon the docket.

Provided, that notice to attend before the master in vacation, shall be served on the opposite party, at least ten days before such attendance required, and when the notice shall be served on the party in term time, and the party shall be at the time of service in the town of Newbern, then one day's notice.

If either party be dissatisfied with the determination of the master, he may except thereto when the case shall be reported by the Master, and determined by the Court.

NEWBERN, March Term, 1792.

The STATE *versus* HIGGINS.

INDICTMENT on the 21 Hen. 8, 7, 188. It appeared in evidence, that the prisoner was a clerk to the prosecutor (a merchant) whose store he attended: that he had sent a parcel of goods from the store, to a person who resided at a distance, with directions to sell them: that he had not communicated this transaction to the prosecutor, or any of his other clerks, and had made no entry of it in the books.

Harris and *Martin*, for the prisoner, contended that he could not be found guilty on this indictment.

1. Because he stood not to the prosecutor, in the relation of a servant, which the statute requires, and the indictment describes.

2. Because the goods embezzled, came not to his hands by delivery of the nature of that described in the statute, and the indictment.

1. They said that the words of a statute are to be taken in their ordinary and most known signification, not so much regarding the propriety of grammar as their general and popular use: and cited 1 Comm. 59.

Now the statute requires that the offender be a *servant*. Perhaps this word in its most extended grammatical sense, may include every person labouring for another, and receiving hire or payment. In its ordinary and popular signification, it reaches no farther than family domestics, and personal attendants. The Painter who draws my picture, the Surgeon who pulls out my tooth, the Taylor who makes my clothes, the Clerk who writes in my office, or attends to my store, are in the first sense my servants; they all labour and are employed by me, and receive payment. Yet were I to describe them by the appellation of my servants, I would not be understood to mean them; or, if I was, I should be censured for giving them an appellation which in the general and popular acceptation of it is confined to persons of an inferior rank.

A celebrated crown law writer, after speaking of the statute upon which the prisoner is indicted, and the 3 & 4 Will. & Mar. 9; says "to the foregoing larcenies, by breach of trust, by *MENIAL servants*, and lodgers, the legislature has added two others, &c." 1 Hawk. 139; sect. 17. He certainly understood that the *servants* to which the statute relates, are only such as are *menial*, who live *intra mœnia* within the walls; in other words *domestic servants*.

The author of the commentaries, after mentioning *menial servants*, apprentices and labourers, says "there is a fourth species of servants, *if they may be so called*: stewards, factors and bailiffs." 1 Comm. 427: which shows that, in his apprehension, the epithet of *servants*, in ordinary and popular use, is not applicable to *Stewards, Factors, &c.*

The same writer, in the next page, says, "a master may by law, correct his apprentice or *servant*." Does he mean that a gentleman could flog his steward, or a merchant his factor? Certainly no.

If the rule of construction, which we have laid down from the commentaries, be a true one: and if the word *servant*, in its common and popular use does not comprehend that description of persons, employed in the capacity in which the prisoner attended the affairs of the prosecutor, it follows that he did not stand to him in the relation contemplated by the statute.

This construction would be the true one in ordinary acts, but this is a penal statute—one penal in the highest degree. *Penal statutes* must be construed *strictly*. 1 Comm. 88. Consequently should the word *servant* be restrained to its ordinary signification.

II. The statute confine the things which may be subject of the offence to such as caskers, jewels, money, goods and chattels, as are delivered to servants *safely to be kept to the use of their masters or mistresses*.

The evidence here is of goods *delivered to be sold*.

Badger for the State. Whatever else may be said, it surely cannot reasonably be denied that the present case is strictly within the mischief for which the act intended to provide a remedy, that is to say, the stealing of goods by persons entrusted to manage them for the ow-

ner an offence not sufficiently punishable at the common law. A merchants' clerk, as the prisoner was, has greater opportunities to embezzle property, than a *servant* of any other description; having by the nature of his business, the custody of more goods and more money. It seems peculiarly necessary therefore, that such persons should be included in this act: for otherwise we are guarded against the smaller evil, and exposed without defence to the greater.

And I contend that this case is also within the words of the act. The words *master* and *servant*, according to their popular use, imply a certain relationship, and wherever that relationship is found, there is properly a master and servant. This relationship consists of the right of superiority and command on one side, and the duty of service and obedience on the other, and this certainly exists between a merchant and his clerk. The nature of the service is an immaterial circumstance; for whether a man assume the care of a stable or store, the business of a groom or clerk, he is still a servant; if he have taken upon himself the duty of obedience, and given the rights of authority to another. The right to command, the obligation to obey is equal in both cases. The time and service in both instances equally belong to the hirer. The contract, which produces the relationship, is the same, and therefore the relationship itself is the same. The politeness of modern times it is true, has not often applied this term to merchants' clerks, some of whom are of good families, and would resent the appellation: but this by no means proves that they are not as clerks, substantially servants, and therefore strictly within the meaning of this act.

The term *servants*, in common language, is very seldom applied to apprentices to merchants, and to several kinds of artificers; yet it never has been denied, I believe, that they are properly servants, and but for the express exception, would as such be within the act.

The very expression, "*MOENIAL servant*," which is very common, implies that there are servants of a different kind, and otherwise the epithet *mœnial*, would be insignificant and useless.

The word *servant*, is used in the act without any epithet to qualify or limit its meaning, and yet it is contended that this general term, which applies equally to all kinds of servants, shall be confined to one kind only, *to wit*, *mœnial servants*. Had such been the intention of the legislature, that common expression must have occurred to them, and would certainly have been adopted. I admit that the mechanic to whom we send a job, is not our servant, nor do the principles for which I contend, imply that he is. There is no authority on one side, no subjection on the other. The mechanic is *employed*, not *directed*. His time is his own, not ours.—He may postpone our work to make room for another's. The relationship between him and us supposes no superiority on our side, and therefore it is not the relationship which subsists between master and servant.

As to the second point,

The goods it is true, were entrusted to the prisoner to be sold,

that they were also in his custody to be *kept* till the sale, and at the time of embezzlement they were in his *keeping*, not having then been sold. His authority to *keep*, had not then expired; he therefore held them under that authority, and therefore his case is within the act.

Till a fair purchaser offered, his authority was merely to *keep*. Neither of these objections is entitled to much favour. The first admits that persons standing substantially in the same situation with the prisoner, only performing different services, and furnished by the nature of their employments, with less power to do mischief, could for the same act, be punishable as felons. The second admits that the prisoner, who attempted to ruin his employer, by embezzling his property, was entrusted to sell it for his benefit, was under engagements, and had received wages for that purpose.

Admitting however, that the prisoner is not to be considered as a servant, and that the goods were not delivered him to *keep*, admitting that he is not within the reach of the statute, when he is guilty of larceny by the common law.

It is true that a *taking* is essential to a larceny; and it is said that an offence cannot be committed where there is a delivery of goods from the owner to the offender upon trust. And the instances mentioned are the loan of a horse, and the sending of goods by a carrier. In these instances however, it is to be observed, differ widely from the present case; the owner in these instances parting entirely with the possession, which for the time belongs exclusively to the carrier, and the grower, each of whom has a special property in the thing delivered. In the present case the offender had not the exclusive possession. The owner had not parted with *his* possession.—The goods were in a store, subject to his controul and direction, which he occasionally exercised. Had a trespass been committed on these goods, the owner could not have maintained an action in his own name, but the act must have been brought in the name of the owner. During every moment of time whilst the prisoner was in the owner's store, the owner might have done whatever he pleased with the goods. The store in which the goods were kept was in *his* possession, nay the prisoner himself was in *his* possession (if I may so speak) having engaged to serve him for hire. As the owner had not parted with the possession of the goods, of course the prisoner could not have the possession of them. If he had any thing, therefore it was only care and oversight, and the embezzlement of goods in such a case is a felony at the common law. The distinction is clearly expressed in *Blackstone* 231. If he had not the possession, but only the care and oversight of the goods, the embezzling of them is felony at the common law. Here the goods were under the prisoner's care, not his possession.

It remains therefore only to shew that though the indictment be founded on the statute, the prisoner may be found guilty of the offence at common law, and to this the *2 Hawk. P. C. 251.* is in point.

WHEREUPON *Harris* and *Martin* prayed to be, and were, heard on the latter part of the argument of the counsel for the state. They said—

The charge against the prisoner presenting itself under another point of view, it behooves us to consider whether the facts charged in the indictment, constitute an offence at common law?

Unless it was an offence at common law, at the time that statute was passed, it is certainly none at this day. Of this the statute furnishes us a negative proof. In the preamble, it is said, after stating such a fact as the one in the indictment, *abich misbehaviour so done, was DOUBTFUL at the common law, whether it was felony or not.*

The preamble of a statute is deemed true, and a good argument may be drawn from it. *1 Inst. 11.*

Hence, it must be deemed true that it was doubtful. If it was doubtful THEN, it cannot be certain now. With this negative evidence in our hands, we ought not to fear an adverse verdict; we may claim a favourable one. For in *dubius semper in favorem valet.*

Yet, in taking a retrospective view of the principal and most important decisions of courts before the reign of *Henry VIII.*, we will perhaps incline still more strongly to believe that, when the statute was passed, the offence under our consideration, was deemed a PRIVATE injury only, and no criminal offence.

We do not mean to say, that the time never was, when such a misbehaviour was considered as a criminal offence, nay as felony. In *England*, as in every other country, during the early age of civil society, no difference was made between moral and civil offences. Many facts were considered as larcenies, which have since been looked upon only as private injuries: thus bailiffs, receivers, and administrators, were said to steal goods; if they did not give in their accounts: false weights and measures, tricks in trade, and other deceits and impositions, are described in the *Mirror* as instances of larceny. *2 Reeves, 351.*

Towards the year 1470, under the reign of *Ed. IV.*, it was held that where a person entrusted goods to the care of a servant, the servant could not take them feloniously, because they were in his possession. *10 Ed. IV. 14.*

Above three years after the following case happened:—

One had bargained with a man to carry certain parcels of goods to *Southampton*. The man took the parcels, carried them to another place, broke them open, took out the goods, and converted them to his own use. Whether this was in law a larceny, was debated with much difference of opinion. It was argued, that a possession of the goods was given by the bailment of the owner; and neither felony nor trespass could be committed of them by the bailee; for he could not be said to take them *vi et armis, & contra pacem*. On the other side it was said, that a man's act becomes felony or trespass according to the intent. If a man abuses a distress, he is a trespasser; and so here all confidence implied in the bailment was superseded by the taking, which discovered his intent to have

been bad from the beginning. It was also said, that this was different from a bailment; for it was only a *bargain to carry*; and what followed shews that this was only a pretence to gain an opportunity for stealing. At length, one of the justices had recourse to a refinement which admitted some of the above reasoning, but exempted this case from the conclusion following upon it. He admitted, that a man who has the possession of goods by bailment, cannot commit felony of them; but here, he said, the goods within the parcels were *not* bailed to the carrier, but the *parcels themselves*; and therefore taking *them* was not felony: but when he broke them open, and took out the *goods*, he did what he had no warrant for, and appeared in a very different light in the eyes of the law. Thus, for instance, if you deliver a tun of wine to a carrier, and he sells it, this is neither felony nor trespass; but if he takes any out of the tun, and sells it, that is felony. In like manner, if I leave the key of my chamber with any one, and he takes any thing out of it, this is felony. The reason to support these cases was, that the things not specifically and expressly delivered, were not in truth bailed, and therefore the party, in *taking* them, intermeddled where he had no trust.

These were the arguments used before the council: the case was afterwards adjourned into the exchequer chamber, and the opinion of all the judges was taken. There it was agreed by *all* the judges, except one, that generally where goods were bailed to another, he could *not* take them feloniously. They held also, that when a possession so obtained had once determined, then the bailee might commit felony in taking them; as, if I bail goods to a man to carry them to my house, which he performs, and afterwards takes them, it is felony; because his possession under the bailment ceased when he delivered them at the house. They argued some points upon the nature of possession. If a guest in an inn takes a cup, he is a felon, because he had not properly a possession, but only the use of it while there. The same of a cook or butler; they are only ministers as to the things within their care; but have no possession, which, in these cases, is always construed by law to be in the master. But it would be different, perhaps, says the book, if goods were *bailed* to a servant; for as they then would be in the actual possession of such servant, he could *not* commit felony of them.

After all, as to the principal case, whether it was agreed, that the bailment ceased upon breaking the parcels open, and the carrier thereby forfeit the legal privileges annexed to him as bailee, and in so taking the goods he was considered as a common person; or whether it was upon the whole thought, that this was not a bailment, but merely a bargain to carry; it is not stated in the report upon which of these grounds they determined; but it was certified to the chancellor by the major part of the justices, that this man was guilty of felony. 3 *Reeves*, 410.

Towards the year 1485, some questions of larceny similar to the one above cited were debated.

It was propounded by *Hafey*, who was then chief justice, whether, if a shepherd took the sheep, or a butler the plate, under care, it could be called felony; he himself thought it was, and related the case of a butler who was hanged under such circumstances; to which a similar case was added by *Haugh*, of a goldsmith, who had taken some things that were entrusted to his charge. In answer to these, *Brian* argued that it could not be felony, because neither of these persons could be said to take the things *vi et armis*, while he had them under his care: and of this opinion were the justices. This was giving a blow to the determination in the time of *Edward IV.* and expressly contradicted some cases that were then taken for settled law, and argued upon as such; especially that of the butler. However, we find this case of the butler was understood otherwise some years after, and a distinction was taken between the possession a butler has while in the master's house, and the possession of a servant entrusted out of the house. It was propounded by *serjeant Pigot*, in the court of king's bench, to *serjeant Cutlar*, in this way; If I bail a bag of silver to my servant to keep, and he goes away with it, can this be felony? *Cutlar* says yes; for as long as he is in my house, or with me, that which I have delivered to him is adjudged in my possession; thus if my butler, who has my plate in his custody, runs away with it, this is felony; the same if a person having the care of my horse goes off with it, because in both these cases the thing remained all along in my possession. But if I deliver a horse to my servant to ride to market, and he rides away with it, this is no felony; because he came to lawful possession of the horse, by the delivery out of my custody. The same if I give him a bag to carry to London, or to pay away to some one, or to purchase something; if he goes away with these it would not be felony; because they were out of my possession, and he had lawful possession of them himself. To this *Pigot* assented, adding that it might, in all these cases, have an action of detinue or account, which idea of possession is consonant to one of the principles laid down in the case so often alluded to. 4 *Reeves*, 178.

In the time of *Henry VIII.* says Mr. *Reeves*, a breach of trust, and embezzlement of effects confided to the custody of a person, were thought not to be a felonious taking and carrying away. This kind of fraud had of late grown common, from the impunity it enjoyed; and many now thought, that, as it carried in it much of the mischief, it deserved the punishment annexed to felony.

The statute upon which this man is indicted, was accordingly passed. It is mentioned in the preamble of this act, as a doubt whether this kind of taking was larceny; a doubt raised, perhaps, by the case determined in 13 *Ed. IV.* which we have before mentioned, and which is thought, and not improbably, to have given some occasion for making this statute.

Tho' the instance of bailment there before the court was, or might be thought, something like a breach of trust reposed in servants, and was determined to be felony; yet the principles there laid

down and agreed to, almost unanimously, led to an opposite conclusion; and there needed all the helps of distinctions and technical nicety to take even that case out of the general rule there laid down. Besides, there is at the bottom of that report an opinion, which qualifies any inference which otherwise might be possibly drawn from it as to this; for admitting that a cook and butler would be guilty of felony, if they converted the goods within their respective departments to their own use, it is there said, that if the same things were bailed to a servant, *perhaps*, as they would be in his possession, he could not commit felony of them. About three years before, it was said by one of the judges, "If one commits the care of his goods to his servant, the servant cannot take them feloniously, because they were in his possession." These were direct authorities upon the point, and, joined with the reasoning upon *bailment* and *possession*, sufficiently shew what were the opinions of lawyers in those times respecting this question. 4 *Reeves*, 284.

The case of the carrier, the butler, the guest, fall short from the present. Their possession and power over the things in their hands was temporary. They could not transfer the property; the master was at all events to have it back again.—In no case was it to be otherwise. In this, the clerk might when he pleased, lawfully so to dispose of the property, that it should never return to the merchant. His possession was quite of a different nature. Theirs to *keep*; his to *sell*.

So strictly have courts adhered to the notion of possession, and its consequences, that in 3 *Hen. VII.* the judges went so far as to agree with *Brian* (who, it may be observed, was one of the judges that dissented from the opinion of felony in 13 *Ed. IV.* in the exchequer-chamber), that neither a shepherd nor a butler could commit larceny of their sheep or plate, because it could not be done *vi et armis*; so much were the opinions changed from what they had been in the reign of *Ed. IV.* when these cases were stated for felony, and allowed without debate. This doctrine we have seen was again discussed in the last reign; and it seemed, in the instance there stated, to be agreed upon so decidedly *against* the felony, as to call for a formal declaration of the law by statute. Thus stood the law upon this subject towards the end of *Henry VII.*'s reign, and so we may suppose it was understood at the time this statute was made. After all these authorities, concludes Mr. *Reeves*, we may be excused in differing from those who think that the point of law which is the subject of this statute was so well settled before, that the doubt about it mentioned in the preamble, is one of those which have much enervated the principles of common law, and could not be the doubt of any lawyer. 4 *Reeves*, 285.

Lord *Hale* considers the offence charged on the indictment, as created by the statute. For, he says; Before the statute of 21 *Hen. chap. 8. 7.* if a man had delivered goods to his servant to keep or carry for him, and he carried them away *animo furandi*, this had not

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been felony, but *by that statute* it is made felony, if of the value of forty shillings; but the offender shall at this day have his clergy; but yet if an apprentice doth this, or if a man delivers a bond to his servant to receive money, or delivers him goods to sell, and he accordingly sells and receives the money, and carries it away *animofurandi*, this is neither felony at common law, nor by this statute. 2 H. H. P. G. 505.

The same doctrine is laid down, Co. P. C. p. 105. 26 H. 8. Dy. 5. a. b.

Having, we trust, satisfactorily shewn, 1st. that the prisoner is not within the reach of the statute, and 2dly, that the facts charged, do not constitute the offence of larceny, we proceed to shew that even if the prisoner was guilty of larceny, he cannot be convicted of it upon the indictment, which the grand jury have found against him.

It is not contended by the counsel for the state, that if he be guilty of any offence at common law, he may be guilty of any thing else but larceny.

Hawkins has been read, in order to establish the position, that though an indictment be founded on a statute, the prisoner may be found guilty of an offence at common law.

Although the truth of this position, in a certain degree, is not to be denied now, it is safe to say, that it is not generally much less universally true. The origin of it may be traced to *Page's case*. The Court, in that case, decided that if persons be indicted, especially on the statute of stabbing, 1 Jac. 16, 6, 351, and the evidence be not sufficient to bring them within the statute, they may be found guilty of general manslaughter, at common law, and the words *contra formam statuti* rejected as senseless.

If the present indictment did not conclude *contra formam statuti*, it would be insufficient, and no judgment could be given upon it: because the offence charged is only prohibited by statute, and not by the common law. See 2 Hawkins, 251.

If an indictment on the statute of stabbing, above cited, did not conclude *contra formam statuti*, still it would be sufficient and good: judgment could be given upon it, as in the case of general manslaughter, or manslaughter at common law, because the facts charged in such indictment, are offences both at common law, and under the statute,

The same verdict, and judgment may be given upon such an indictment, concluding *contra formam statuti*, in case the evidence does not bring the prisoner within the statute.

Thus if one be indicted, on the 3 El. 9. 304. for perjury, and it be not stated, that he wilfully and corruptly committed perjury, but either that he falsely and voluntarily, Savil 43, or falsely and corruptly, Heil. 12, or falsely and deceptively. 2 Leo. 3 Leo. 230, Shower 190. In all these cases, the indictment is bad for an offence on the statute, but is good at common law.

Yet, if the fact proved, amounted to the crime of larceny, still the prisoner at the bar, could not be found guilty of that offence, be-

cause it is not charged in it.

It is not sufficient that the offence charged, be prohibited both at the common law and by the statute, in order to support a verdict, by rejecting the words *contra formam statuti*: it is still necessary that the technical words, requisite in the description of the offence at common law, be inserted in the indictment.

An indictment ought to have proper terms of law. 4 Comyns, 398.

The word *cepit* is necessary and requisite in an indictment for larceny. 2, H. P. C. c. 25, § 55, p. 224. no other will answer.

It is not in the indictment.

The position established in the latter part of the argument for the state is neither *universally* or *generally* true. It is true only in the case of an indictment respecting facts prohibited, both at the common law and by statute: neither is it true, in all such cases, for it will fail, if the indictment does not contain a technical description of a common law offence.

I. The prisoner therefore cannot be found guilty under the statute.

1. Because he does not stand in that *relation* which the statute requires, and the indictment describes.

2. Because the goods did not come to his hands, by the *delivery*, which *alone* can bring his offence within the statute.

II. He cannot be found guilty at the common law.

1. Because the facts charged are made criminal by the statute *only*.

2. Because the offence of larceny is not *charged* in the indictment.

WILLIAMS, J. told the Jury he thought the prisoner might be found guilty *either* at common law, or upon the statute.

ASHE, J. thought he might be found guilty at common law, but could *not* be convicted on the statute.

The Jury withdrew, and found the prisoner *not* guilty of the felony upon the statute, but *guilty* of the felony at common law.

On the next day, the prisoner was brought to the bar, and being asked what he had to say, &c.

Harris and Martin moved an arrest of the judgment, and filed reasons.

The counsel for the state, not being ready to enter upon an argument, on this motion; the consideration of it was postponed till next court: and

On motion of the prisoner's counsel, it was ordered that the prisoner be discharged from confinement, on his giving bail, before some of the Justices of the county of Craven, residing in the town of Newbern.

In September 1792, there was no court.

72 And at *March Term*, 1793, the consideration of the motion, in arrest of judgment was taken up, and without any argument.

JUDGMENT ARRESTED.

•• The prisoner, had remained in jail, not being able to procure bail, upwards of a twelve months, and Mr. *Sol. Gen. Jones* (partly out of compassion to him, and partly on account of the late hour at which the court came to the case, on the last day of the term) did not oppose the motion in arrest.

NEWBURN, — *Term*, 179—

SALMON *versus* SMOOT & BOND.

ORIGINAL attachment. The plaintiff had directed *Richardson* to be summoned as a garnishee, and the sheriff had returned, on the back of the attachment, that he was not to be found.

Richardson came into the Court-House about other business, and *Davie* for the plaintiff, moved that he might answer to his garnishment.

This was objected to by *Martin* for the garnishee, who said that *Richardson* could not be compelled to answer before due service. A garnishee may be considered as a witness, or as a party to the suit.

A witness is not compellable to give evidence if he has not been legally summoned.

It is no contempt of the court, for a by-stander to refuse to be examined. *Bowles vs. Johnston*, 1 *Blackst. Rep.* 26.

The case is much stronger, if he be considered as a party. He must then be regularly brought in, and the law gives him two terms to determine on one of the alternatives, which it holds out to him, either to give bail, suffer judgment to go against him for the whole debt, or submit to an examination.

The Court, *ASHE, J.* and *WILLIAMS, J.* overruled these objections; saying this matter had been lately debated at *Wilmington*, and determined against the garnishee.

EDINTON, *October Term*, 1796.

GORDON *versus* PAYNE & MARE.

DEBT on a bond. *Non est factum* pleaded. *Robert Egah*, the subscribing witness to the bond, having been summoned by the plaintiff, went off sometime before court to *New-York* on his private business. It was admitted that he was dangerously ill there, and that the last that was heard from him, was that he was given o-

ver, by his physician. Upon this, the plaintiff's counsel offered to prove the hand writing of the witness, as evidence of the execution of the bond; but

M'Coy J. refused to admit the testimony; and he was nonsuited.

Egan was actually dead at the time.

NEWBURN, March Term, 1797.

STARKEY's ADM'RS. *versus* M'CLURE.

TROVER for several slaves. The plaintiffs claimed them under a division (by consent of all parties) of slaves held in joint tenancy under a will, by their intestate, the person under whom the defendant held, and others.

One of those persons, who had taken a lot of slaves under this division, but who was no party to this suit, was introduced on the part of the plaintiffs, to shew that such a division by consent, had been made.

The defendant's counsel objected to that person being sworn, on the ground of interest, and on argument:

The Court, WILLIAMS, J. and M'Coy, J. allowed the objection.

Taylor and *Graham* for the plaintiffs: *Badger* and *Harris* for the defendant.

NEWBURN, March Term, 1797.

IN EQUITY.

HUNT *versus* M'KINLAY & WILLIAMS.

THE Complainant, since the beginning of this term, had obtained an injunction against the defendants, on a bill returnable to September court: and on the first of the Equity days,

Taylor and *Badger* for the defendants, read an affidavit of the Deputy-Sheriff, stating that he had informed the complainant, forty days before the term, that he had the execution in his hands, requesting him to point out property, on which it might be levied. They said the complainant might have obtained an injunction on a bill returnable to this term, by going to one of the Judges, as soon as he knew the execution was out: that his waiting 'till the beginning of the term, shewed an inclination to put off the defendant, &c. and moved the bill and answer might be read.

Martin for the complainant, did not oppose the motion.

The Court, WILLIAMS, J. and M'Coy, J. seemed averse to granting the motion.

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On the next day they directed the bill and answer to be read; but, as they deemed the equity of the bill not sworn away in the answer, the defendants took nothing by their motion.

FAYETTEVILLE, *April Term, 1791.*

SKIPPER *versus* HARGROVE.

DETINUE. *Non detinet* and statute of limitations pleaded. The Jury brought the following special verdict.

"The Jury sworn, find the defendant doth detain the negroes as set forth in the plaintiff's declaration, *to wit, Patience* of the price of two hundred pounds, *Ally*, of the price of £. 100, and *Violet*, of the price of £. 100. They farther find, that the negro *Bet*, also set forth in the plaintiff's declaration, was at the time demanded, in possession of the defendant, and the property of the plaintiff; that she was demanded of the defendant, who refused to deliver her up, and that she is since dead. If the law is in favor of the plaintiff, they find the defendant doth detain the said negro *Bet* of the price of £. 50, and if the law is in favor of the defendant, then that she doth not detain the said negro *Bet*, and assess the plaintiff's damage, to 6 and 6d. costs."

The Court, SPENCER, J. and M'Coy, J. gave judgment for the plaintiff.

FAYETTEVILLE, *April Term, 1791.*

WINDSOR *versus* WALKER.

TROVER. The Jury brought in the following special verdict, *viz.*

"The Jury sworn, find the defendant guilty, and assess the plaintiff's damage to £. 4 and 6d. costs: subject to the opinion of the Court, on the following case. The plaintiff owned a boat, which drifted down the river, and was taken up by the defendant, who claimed salvage, and accordingly refused to restore it, until that was paid."

The Court, SPENCER, J. and M'Coy, J. gave judgment for the DEFENDANT.

FAYETTEVILLE, October Term, 1792.

PEN on demise of MABLY *versus* STAINBACK & TURNER.

J ECTMENT. The Jury brought in the following special verdict.

"The Jury sworn, find that *John Hardiway* died, seized in fee of the premises in question, that he executed his will in due form of law, in these words, "In the name of God, I *John Hardiway*, of the county of *Brunswick*, being in perfect sense and sound memory, do make this my last will and testament, revoking all others. My soul I commit to Christ, who redeemed it, my body to be decently buried, and for my estate that God has blessed me with, I give as follows, to wit, I give to my daughter *Frances Candel* the following negroes, *Little Tom, David, Burnett, Harry, Sue, Sterling*, to her and her heirs forever. Item, I give to my son *Marcus Hardiway*, the following negroes, *Great Tom, Isabel, Sam, Little Hannab, Bob, Frank*, to him and his heirs forever. Item, I give to my daughter *Sarah Hardiway*, the following negroes, *Nat, Lucy, Lydia, Jane, Sall, Senos*, to her and her heirs forever. Item, I give to daughter *Nancy Hardiway* the following negroes, *Patty, Claris, Let, Little Peg, Old Hannab, Old Lewis*, Item, I do also give to my son *Marcus Hardiway*, One Horse, known by the name *Dick*, and one feather bed, and to my daughter *Frances Candel*, the filly known by the name of *Mark Anthony*. Item, the rest of estate, negroes, stock and house furniture, to be equally divided between my wife *Mary Hardiway* and my son *Hartnell Hardiway* and daughter *Rebecca Hardiway*. I likewise do appoint my son *Marcus Hardiway* and *William Candel* my executors, whereunto I have set my hand and fixed my seal, this ninth day of December, in the fourth year of our commonwealth."

"TEST,

"WILLIAM HARRISON,

her

JOHN HARDIWAY. (L. S.)"

"ROSE X STEWART,

Mark.

"JAMES OWEN.

"That he died in the year 1779, leaving *Marcus Hardiway* his eldest son and heir at law, and one of his executors. That *Marcus Hardiway* died, having entered on the premises, that the plaintiff is heir of the coheirs of said *Marcus*: they farther find that the defendants are lessees of the widow *Mary Hardiway*, since *Mary Clark* and her children *Hartnell Hardiway* and *Rebecca* in said will mentioned."

Taylor for the defendant. The question is, whether under the will of the will, the widow *Mary Hardiway*, *Hartnell Hardiway*, *Rebecca Hardiway*, under whom the defendants claim, take any,

and what part of the real estate? The testator's intention of all his property, is manifested by the introductory as well as by the residuary clause. Estate is a technical expression, to which a definite meaning is affixed. It comprehends the right as well as to personal property, and even by grant of estate, all shall pass what he can grant, *a fortiori* by devise. *inst.* 117, 129. The words "all a man's estate," have been held to carry a fee, without any words of limitation or perpetuity. *Wils.* 333. It is now clearly settled that the words "all his estate" will pass every thing a man has, unless accompanied with a description. Farther, if the word *estate* does not, in the case, it will be wholly inoperative, since whatever else the testator had is specifically bequeathed, or covered by negroes, stock and furniture.

The introduction is material: nor that, independently of the circumstances, it is sufficient to change the construction of a will, but as it affixes to shew the intention of the testator. *Courtenay*. The case of *Turner vs. Moore* is so nearly alike in its circumstances that it ought to govern the decision of the present; and with the authority of that case, there can be no doubt, as it was decided by lord King, whose decree was affirmed by lord Talbot *temp. Talbot*, 284. He also relied upon 2 *Term Rep.* 411, 106. *Salk.* 236. 3 *Mod.* 45. 2 *Vest.* 564. 2 *Peere William* 2 *Equ. C. A.* 329. *H. Bl. Rep.* 123.

Moore for the lessors of the plaintiff, argued that the heir could not be disinherited without express words, that the generality of the word *estate*, was limited by the subsequent word, shew what the testator meant by using it. That residue must shew something which went before, but lands are no where mentioned in the will, he cited and relied upon 2 *Eq. Cas. abridg.* 328. *Ray.* 1324.

WILLIAMS, J. was decidedly of opinion that the word *estate* comprehended all a man could dispose of, real as well as personal.

ASHE, J. doubted.

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The suit was afterwards taken out of Court.

FAYETTEVILLE, *October Term, 1792.*

HODGES *versus* CLINTON,

CASE. The Jury found the following special verdict.
 "The Jury sworn, find that the defendant did assume;
 "no set-off, find the defendant did not take the benefit of the
 "of insolvency, and assess the plaintiff's damage to £. 73 16/-
 "6/- costs: subject to the opinion of the Court, whether the

which the plaintiff's action is grounded, is a negotiable note within the statute, if it is, they find for plaintiff, if not, for defendant.

The note was for £. 100 currency, payable in tobacco.

For the defendant, argued, that no decision upon the 3d of June 9, to which our act of 1762 was in analogy was to be made, that gave negociability to notes, except they were for the payment of money alone. Besides the many cases establishing the same, that even notes payable in money are not negotiable, if they are contingent, the case of the East-India bond is in point with the present. *Moore vs. Venute*. And if any thing else is promised as the payment of money, the note is not negotiable. *Sharp*. The design of the act, which was to give to notes a circulation equally beneficial to commerce with bills of exchange, would be frustrated by a contrary decision.

Judgment for the DEFENDANT.

NEWBURN, March Term, 1797.

DANIEL vs. COBB'S EXECUTOR. *Ante p. 42.*

At this term, this cause was by consent of the counsel of both parties, reconsidered—and after a very lengthy argument :

WILLIAMS, J. thought the action of detinue, did not survive the representatives of a deceased person.

M'Coy, J. did not think proper to alter the opinion he had declared at the last term.

And the cause was left open.

* During the argument of this cause, it appeared to be conceded by the counsel for the plaintiff, Mr. Harris, and his honor Judge Williams, that the *wager of law*, having never been recognized in this state, that part of the common law, which authorizes admission of that species of evidence, is not in force here. Gen. Bowie, and his honor Judge M'Coy, did not intimate an opinion on that point. *Quare de hoc.*

MOORE vs. JELAR.

THE Court, WILLIAMS, J. and M'COY, J. held in this case;
 1. That Sheriffs in no instance, are intitled to costs for services, other than what shall appear of record, by the return of process, to them directed.

2. That witnesses who do not attend to the direction of the law in procuring and filing tickets of their attendance, shall not afterwards be permitted to draw up accounts, and prove them out of court and thereby entitle themselves to have them taxed in the bill of costs.



CIRCUIT COURT OF THE UNITED STATES.
NORTH-CAROLINA DISTRICT.

HAMILTONS *versus* EATON,

DECLARATION.

*S. Southern Circuit,
N. Carolina District.* }

{ *Circuit Court,
June Term, 1792.*

A RCHIBALD HAMILTON and *John Hamilton*, merchants, of Great-Britain, and copartners in trade, under the firm of *Archibald Hamilton and company*, complain of *John Eaton*, surviving obligor of *Gabriel Long* dec. citizen of and resident within the state and district of North-Carolina, and within the jurisdiction of this honourable court, in custody of the Marshall of the said district, &c. of a plea that he render to them, eight hundred pounds, proclamation money, of the value of 2,000 dollars, money of the United States, which to them he owes, and from them unjustly detains: for that, whereas the said defendant, on the eleventh day of August, in the year 1777, at the county of Halifax aforesaid, in the province and district aforesaid, one of the United States of America, in the southern circuit, and now within the jurisdiction of this honourable court, made his certain writing obligatory, sealed with his seal and to the court shewn here thereon, and the date whereof is on the same day and year aforesaid, whereby the said defendant did bind and oblige himself to pay to them, the said *Archibald* and *John*, the aforesaid sum of 800 pounds of the value aforesaid, whenever afterwards he should be thereto required.

Nevertheless the said defendant did not, nor hath not paid to them, the said *Archibald* and *John*, the aforesaid sum of 800 hundred pounds of the value aforesaid; altho' often required, and particularly on the tenth day of May, in the year 1789, at the county aforesaid, within the state and district aforesaid, and within the jurisdiction of this honourable court, but the same to them to pay, as hitherto altogether refused and still does refuse to pay, and detain the same to the damage of the said plaintiffs five hundred dollars, and therefore they bring suit, &c.

W. R. DAVIE, *pro Quer.*

John Doe and Richard Roe, pledges.

A

I. AND the said *John Eaton*, by *John Haywood*, his attorney, comes and defends the force and injury, when &c. and craves oyer of the writing obligatory aforesaid : and it is read to him in these words, to wit.

KNOW all men by these presents, that we *John Eaton* and *Gabriel Long* of the county of *Halifax* and province of *Norrib-Carolina*, are held and firmly bound unto *Archibald Hamilton and Co.* of the county and province aforesaid, in the just and full sum of eight hundred pounds, proclamation money, to be paid unto the said *Archibald Hamilton and Co.* their certain attorney, their heirs, executors, administrators, or assigns : To which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this eleventh day of *August*, Anno Dom. 1777.

And he likewise craves oyer of the condition of the said writing obligatory, and it is read to him in these words, to wit.

THE condition of the above obligation is such, that if the above bound *John Eaton* and *Gabriel Long* do and shall well and truly pay, or cause to be paid, unto the said *Archibald Hamilton and Co.* their certain Attorney, their executors, administrators, or assigns, the just sum of four hundred pounds like money, on or before the first day of *August* next, with lawful interest from the date, then the above obligation to be void ; or else to remain in full force and virtue.

Which being read and heard, the said *John Eaton* saith, that the said plaintiffs ought not to have or maintain their said action against him, because he saith, that on the 4th day of *July* in the year of our Lord, 1776, and from thence continually afterwards unto the thirtieth day of *November*, in the year of our Lord 1782, there was an open war between the king of *Great-Britain* and the *United States of America*, and that on the said fourth day of *July*, in the said year of our lord 1776, the aforesaid plaintiffs, and each of them were residents and inhabitants of this state, and continued to reside and inhabit within the same, until the twentieth day of *October*, in the year of our lord 1777 ; on which said twentieth day of *October*, the said plaintiffs withdrew themselves, and each of them withdrew himself, from this state, and from the *United States of America*, to wit, at the county of *Halifax* in this state ; and continually afterwards, from the day last aforesaid, until the termination of said war, the said plaintiffs and each of them, resided beyond the limits of the said *United States*, under the sovereignty and jurisdiction of the said king, owning and acknowledging their allegiance to him, and during all the time last aforesaid the said plaintiffs or either of them, did not return into this state to be admitted as a citizen or citizens thereof ; and that during the time of the said war, between the said king of *Great-Britain* and the said *United States of America*, by a certain act of the *General Assembly*, held

at Halifax, on the eighteenth day of October, in the year of our Lord 1779, entitled, "*an act to carry into effect an act passed at Newbern in the year 1777, entitled, an act for confiscating the property of all such persons as are inimical to this or the United States, and of such persons as shall not within a certain time therein mentioned, appear and submit to the state, whether they shall be received as citizens thereof, and of such persons as shall so appear, and shall not be admitted as citizens, and for other purposes therein mentioned,*" reciting that whereas it is enacted by the aforesaid act passed at Newbern, in November one thousand seven hundred and seventy seven, that all the lands, tenements and hereditaments, and moveable property within this state, and all and every right, title and interest therein of which any person was seized or possessed, or to which any person had title, on the fourth day of July, in the year 1776, who, on the said day was absent from this state, and every part of the United States, or who has withdrawn himself from this or any of the United States, after the day aforesaid, and still resides beyond the limits of the United States, shall and are hereby declared to be confiscated to the use of this state, unless such person, shall at the then next General Assembly, which should be held after the first day of November, in the year 1777, appear and be admitted to the privilege of a citizen of this state, and restored to the possession or property which to him once belonged within the same; and whereas divers persons who come within the descriptions of the aforesaid recited act, had failed or neglected to appear before the said General Assembly as last mentioned, or at any General Assembly since, and submit to the state whether they should be admitted as citizens thereof, and restored to the possessions which to then once belonged, whereby such certain persons therein after mentioned had clearly incurred and become liable to the penalties of the aforesaid first recited act: in consideration thereof, by the authority of the same General Assembly, it was therein enacted, that all the lands, tenements, hereditaments and personal property within this state, of divers persons therein particularly named, and amongst others of *John Hamilton* and *Archibald Hamilton*, by the names of *John Hamilton* and *Archibald Hamilton*, late of Halifax, and of all others coming within the meaning of the said confiscation act, and of that act passed at Halifax, and all and every the right, title and interest, which all, or each of the persons aforesaid may have had therein, on the said fourth day of July in the year 1776, or at any time since should be, and were thereby, declared to be confiscated fully and absolutely forfeited to this state, and should be vested in the hands of commissioners as in the said act directed to be appointed for the purposes therein after mentioned. And by the authority of the same General Assembly, it was further therein enacted that commissioners should be appointed, by the county court in each county, who in their respective counties should have full power and authority, to take possession of all lands, tenements, hereditaments, monies, debts, whether due by judgment, bond, bill, note,

4.
account, or otherwise, and all other personal property of the persons
aforesaid, in the name and for the use of the state, which thereby
were declared to be forfeited to the said state, and give receipts and
discharges which should forever indemnify all persons delivering or
paying the same, their heirs, executors or administrators, against any
future claim, for the articles or money, mentioned in such receipts
or discharges. And by the authority of the same General Assembly,
it was therein further enacted, that the said commissioners might or-
der the several constables to summon any of the inhabitants in their
respective counties to appear before them, at convenient times and
places, to render on oath an account of such forfeited property, and
that they, or a majority of them being present, should administer
on oath or affirmation to the inhabitants so appearing, whereby each
inhabitant, rendering an account, should swear, or affirm, that the
account by him rendered, contained a true and full account to the
best of his knowledge, of all the lands, tenements, hereditaments,
debts, monies, and all personal property in the county or elsewhere,
which belonged on the fourth day of July, in the year of our lord
1776, to any of the (therein) before mentioned person or persons, or
any time since, who came within, or are included by the descrip-
tions, or either of them, recited in the said act or the confiscation act,
passed at *Newbern*, in the year 1777, and that he had not disposed,
or parted with the same, or any part thereof, to elude or evade the
intent and meaning of the confiscation act, or of that act passed at
Halifax, and further that the said account contained, to the best of
his recollection, the full amount of all and every sum, and sums of
money which then were by him due, and owing to any such person
or persons, including interest, if any due, by bond, note or account, or
by virtue of any trust whatever; and if any person summoned as a-
foresaid, should fail to appear, or appearing, should fail to render
an account as above mentioned, on oath or affirmation, as the case
might be, in such case the said commissioners or a majority of them
should have power to commit such person, if present, to close goal
until he or she should comply with the law; and if absent, should
issue a warrant, directed to any Sheriff or Constable, to apprehend
and bring such absent person before them, at any place, on a future
day, when, if he or she should refuse to render an account on oath or
affirmation as aforesaid, he or she should also be committed to close
goal, until he or she should render an account on oath as aforesaid;
and the said commissioners were thereby invested with power to ad-
minister the oath, issue warrants and make commitments in manner
aforesaid. And the said commissioners were thereby invested with
full power and authority to demand, make distress for, and receive
all sums of money due and owing by the inhabitants of their respec-
tive counties, and declared forfeited by the said act, and were there-
by made liable to account for the same to the public treasurers of this
state. And the said *John Eaton* further saith, that on the day of
the making of the aforesaid act, passed at *Halifax*, and also from the

day of the date of the said writing obligatory, and from thence continually afterwards, until this present day, he, the said *John*, hath been an inhabitant of the said state, being and residing within the same, *to wit*, at the county of *Halifax* aforesaid, and that after the making of the aforesaid act passed at *Halifax*, the court of pleas and quarter sessions for the said county, held for the said county, at the town of *Halifax*, in the said county, on the — day of — in the year of our lord 1780, duly appointed *Samuel Weldon*, *William Wooting* and *William Montfort*, to be commissioners for the purposes aforesaid, in the said act expressed, for the said county of *Halifax*, who then and there accepted the appointment, and having duly qualified themselves for the same, by performing and complying with the several requisites by law prescribed in such case, then and there took upon themselves the exercise thereof: and that the said commissioners, after their appointment and qualification as aforesaid, caused the said *John Eaton* to be summoned according to the directions of the aforesaid act, to appear before them on the fifteenth day of April, in the year of our lord 1780, in the county aforesaid, to give in on oath, an account, among other things, of all and every the sum and sums of money as aforesaid, by him due and owing to the persons aforesaid; whereupon the said *John Eaton*, then and there appeared before the said commissioners and rendered to them, on oath, an account of the sum of £. 460, being the principal and interest then due, in the said writing obligatory above specified, and that afterwards, *to wit*, on the same day and year last aforesaid, in the county aforesaid, that he, the said *John Eaton*, by the commissioners aforesaid was required to pay them the said sum of four hundred and sixty pounds, according to the directions and intent of the act aforesaid; and that he the said *John Eaton* thereupon, then and there, paid to the said commissioners the aforesaid sum of £. 460, being the whole sum mentioned in the condition aforesaid, and all the interest therefore then due: and that thereupon the said commissioners, then and there, made and delivered to him the said *John Eaton*, a receipt and discharge of and for the sum aforesaid, by him paid as aforesaid, according to directions of the act aforesaid: and this he is ready to verify. Wherefore he prays judgment, whether the said plaintiffs ought to have or maintain their said action against him; together with this, that he is ready to verify that the said *John Hamilton* and *Archibald Hamilton* above named in the said declaration, and the said *John Hamilton* and *Archibald Hamilton*, in the aforesaid act of the said General Assembly likewise named, are the same and not different persons.

II. AND the said *John Eaton* further saith, that the said *John Hamilton* and *Archibald Hamilton* ought not to have and maintain their said action against him, because he saith that on the fourth day of July, in the year of our lord 1776, and continually afterwards, until the third day of September in the year of our lord 1782, a war

was prosecuted and carried on against the United States of America by the king of Great Britain : And that in the time of the continuance thereof, by a certain act of the General Assembly of the state of North-Carolina, held at *Newbern*, on the fifteenth day of November, in the year of our lord 1777, it was amongst other things enacted by the authority of the same General Assembly, that all the lands, tenements, hereditaments and moveable property, within this said state, and all and every right, title, and interest therein, of which any person was seized, or to which any person had title on the fourth day of July, in the year of our lord 1776, who, on the aforesaid day, was absent from the said state and every part of the United States, and who then was still absent from the same, and then at any time during the war had attached himself to, or aided or abetted, the enemies of the said United States ; or who then had withdrawn himself from the said state, or any of the United States, and who then resided beyond the limits of the said United States, should be and are thereby declared to be confiscated to the use of the said state, unless such persons should at the next General Assembly, which should be held after the first day of October in the year 1778, appear and be by the said Assembly admitted to the privilege of a citizen of this said state, and restored to the possession and property which to him once belonged within the same. And the said *John Eaton* further saith, that afterwards, by one other act of the General Assembly of this state aforesaid, held at *Halifax*, on the eighteenth day of October, in the year of our lord 1779, reciting the act last aforesaid, and that whereas divers persons, who come within the description of the aforesaid recited act, had failed or neglected to appear before the said General Assembly as therein mentioned, or at any General Assembly (then) since and submit to the state whether they should be admitted as citizens thereof, and restored to the possessions which to them once belonged, whereby such certain persons in the said last mentioned act, therein after mentioned had clearly incurred and became liable to the penalties of the aforesaid first recited act, in consideration thereof, it was enacted by the authority of the same General Assembly, held at *Halifax* as aforesaid, amongst other things, that all the lands, tenements, hereditaments and personal property within the said state, of divers persons in the said last mentioned act named, and amongst others, of *John Hamilton* and *Archibald Hamilton*, then late of *Halifax*, and of all others who then came within the meaning of the aforesaid act first above mentioned, and of the said last mentioned act, and all and every the right, title, and interest, which all or each of the persons aforesaid may have had therein, on the said fourth day of July, 1776, or at any time (then) since, should be and, thereby are declared to be confiscated, *fully and absolutely forfeited* to the said state, and should be vested in the hands of commissioners as therein directed to be appointed for the purpose therein after mentioned : and it was thereby further enacted, that commissioners should be ap-

pointed by the county court in each county, who should have full power and authority to take possession of all lands, tenements, hereditaments, monies, debts, whether due by judgment, bond, bill, note, account or otherwise, and other personal property of the persons aforesaid, in the name and for the use of the said state, which by the said act were declared to be forfeited to the said state: and that *they* give receipts and discharges which should forever indemnify and acquit the persons delivering or paying the same, their heirs, executors, and administrators, against any further claim for the articles or money mentioned in such receipts or discharges. And the said *John Eaton* further saith, that in the time when the said war was yet continuing, and upon the said fourth day of July, in the year of our lord 1776, and continually afterwards, until the time of their departure from this state, herein after mentioned, the said plaintiffs, in the said declaration named, were residents, and each of them, was a resident, inhabiting and residing within the limits of the said state of North-Carolina, *to wit*, in the county of Halifax, and that they the said plaintiffs whilst the said war was yet continuing, and after the said fourth day of July, in the year of our lord 1776, and before the making of the said acts herein before mentioned, or either of them, *that is to say*, on the first day of September, in the year of our lord 1777, at the county of Halifax aforesaid, did withdraw themselves, and each of them did withdraw himself, from this said state, and that they the said plaintiffs, and each of them, at the time of the making of the said first mentioned act, and also at the time of the said last mentioned act, and each of them, resided beyond the limits of the United States of America, and that they the said plaintiffs or either of them, at the time of the making of the aforesaid last mentioned act, had not, nor had either of them, appeared before any General Assembly of the said state, to be admitted a citizen or citizens thereof and to be restored to the possession and property which to them once belonged within the same; nor had the said plaintiffs, or either of them, after their departure from this state as aforesaid, ever at any time thereafter, been admitted as citizens thereof, and restored to the possession and property which to them once belonged as aforesaid. And the said *John Eaton* saith, that at the time of passing the acts herein before mentioned, and each of them, and long before that time, *that is to say*, from the day of the date of the writing obligatory aforesaid, until the present day, that he the said *John Eaton* hath been continually an inhabitant and resident of this state, dwelling and residing within the same, *to wit*, at the county of Halifax aforesaid. And so the said *John Eaton* saith, that by reason of the premises, and by force of the acts of the General Assembly in such case made and provided, the debt aforesaid in the declaration aforesaid, and in the writing obligatory aforesaid above specified, hath been and *is now confiscated and fully and absolutely forfeited to* and vested in the said state: and this he is ready to verify. Wherefore he prays judgment whether the

was prosecuted and carried on against the United States of America by the king of Great Britain : And that in the time of the continuance thereof, by a certain act of the General Assembly of the state of North-Carolina, held at *Newbern*, on the fifteenth day of November, in the year of our lord 1777, it was amongst other things enacted by the authority of the same General Assembly, that all the lands, tenements, hereditaments and moveable property, within this said state, and all and every right, title, and interest therein, of which any person was seized, or to which any person had title on the fourth day of July, in the year of our lord 1776, who, on the aforesaid day, was absent from the said state and every part of the United States, and who then was still absent from the same, and then at any time during the war had attached himself to, or aided or abetted, the enemies of the said United States ; or who then had withdrawn himself from the said state, or any of the United States, and who then resided beyond the limits of the said United States, should be and are thereby declared to be confiscated to the use of the said state, unless such persons should at the next General Assembly, which should be held after the first day of October in the year 1778, appear and be by the said Assembly admitted to the privilege of a citizen of this said state, and restored to the possession and property which to him once belonged within the same. And the said *John Eaton* further saith, that afterwards, by one other act of the General Assembly of this state aforesaid, held at *Halifax*, on the eighteenth day of October, in the year of our lord 1779, reciting the act last aforesaid, and that whereas divers persons, who come within the description of the aforesaid recited act, had failed or neglected to appear before the said General Assembly as therein mentioned, or at any General Assembly (then) since and submit to the state, whether they should be admitted as citizens thereof, and restored to the possessions which to them once belonged, whereby such certain persons in the said last mentioned act, therein after mentioned had clearly incurred and became liable to the penalties of the aforesaid first recited act, in consideration thereof, it was enacted by the authority of the same General Assembly, held at *Halifax* as aforesaid, amongst other things, that all the lands, tenements, hereditaments and personal property within the said state, of divers persons in the said last mentioned act named, and amongst others, of *John Hamilton* and *Archibald Hamilton*, then late of *Halifax*, and of all others who then came within the meaning of the aforesaid act first above mentioned, and of the said last mentioned act, and all and every the right, title, and interest, which all or each of the persons aforesaid may have had therein, on the said fourth day of July, 1776, or at any time (then) since, should be and thereby are declared to be confiscated, *fully and absolutely forfeited* to the said state, and should be vested in the hands of commissioners as therein directed to be appointed for the purpose therein after mentioned : and it was thereby further enacted, that commissioners should be ap-

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pointed by the county court in each county, who should have full power and authority to take possession of all lands, tenements, hereditaments, monies, debts, whether due by judgment, bond, bill, note, account or otherwise, and other personal property of the persons aforesaid, in the name and for the use of the said state, which by the said act were declared to be forfeited to the said state, and that *five receipts and discharges* which should *forever indemnify* and acquit the persons delivering or paying the same, their heirs, executors, and administrators, against any further claim for the articles or money mentioned in such receipts or discharges. And the said *John Eaton* further saith, that in the time when the said war was yet continuing, and upon the said fourth day of July, in the year of our lord 1776, and continually afterwards, until the time of their departure from this state, herein after mentioned, the said plaintiffs, in the said declaration named, were residents, and each of them, was a resident, inhabiting and residing within the limits of the said state of North-Carolina, *to wit*, in the county of Halifax, and that they the said plaintiffs whilst the said war was yet continuing, and after the said fourth day of July, in the year of our lord 1776, and before the making of the said acts herein before mentioned, or either of them, *that is to say*, on the first day of September, in the year of our lord 1777, at the county of Halifax aforesaid, did withdraw themselves, and each of them did withdraw himself, from this said state, and that they the said plaintiffs, and each of them, at the time of the making of the said first mentioned act, and also at the time of the said last mentioned act, and each of them, resided beyond the limits of the United States of America, and that they the said plaintiffs or either of them, at the time of the making of the aforesaid last mentioned act, had not, nor had either of them, appeared before any General Assembly of the said state, to be admitted a citizen or citizens thereof and to be restored to the possession and property which to them once belonged within the same; nor had the said plaintiffs, or either of them, after their departure from this state as aforesaid, ever at any time thereafter, been admitted as citizens thereof, and restored to the possession and property which to them once belonged as aforesaid. And the said *John Eaton* saith, that at the time of passing the acts herein before mentioned, and each of them, and long before that time, *that is to say*, from the day of the date of the writing obligatory aforesaid, until the present day, that he the said *John Eaton* hath been continually an inhabitant and resident of this state, dwelling and residing within the same, *to wit*, at the county of Halifax aforesaid. And so the said *John Eaton* saith, that by reason of the premises, and by force of the acts of the General Assembly in such case made and provided, the debt aforesaid in the declaration aforesaid, and in the writing obligatory aforesaid above specified, hath been and *is now confiscated and fully and absolutely forfeited to* and vested in the said state: and this he is ready to verify. Wherefore he prays judgment whether the

said *John Hamilton* and *Archibald Hamilton* ought to have or maintain their said action against him : together with this, that he said *John Eaton* is ready to verify that the said *John Hamilton* and *Archibald Hamilton* in in the said declaration, and the said *John Hamilton* and *Archibald Hamilton* likewise above named herein, and so in the act aforesaid, passed at Halifax, are the same and not different persons.

III. AND the said *John Eaton*, for further plea in bar, saith that by the aforesaid act, passed at Halifax, reciting that where many persons, who before that time refused to take the oath of allegiance to the state, and were compelled to leave the same, in consequence thereof, by virtue of an act of Assembly, passed at *Newbern* in April, in the year of our lord 1777, entitled, *an act for declaring what crimes and practices against the state shall be treason, and what shall be misprision of treason, and providing punishments adequate to crimes of both classes, and for preventing the dangers which may arise from persons disaffected to the state*, and of another act passed at *Newbern*, in November, in the year 1777, to amend the aforesaid act, had failed or neglected to sell or convey their real estates, agreeable to the said acts, and to appoint lawful agents and attornies to receive and give discharges for debts due and owing by the inhabitants of the said state, to persons who so departed therefrom, whereby many lands of the persons last described, were them yet undisposed of, and still continued to be and remain to the use of the same, and many well meaning people were defeated of an opportunity to discharge such debts due as aforesaid : in consideration thereof, it was enacted, that all such lands of the persons described in these said last recited acts, which had not then been sold and disposed of *bona fide*, for a valuable consideration, actually paid, and all debts, money and personal property belonging to the same, then not yet collected and appropriated, according to the directions of the said acts therein recited, should be, and thereby were declared to be, forfeited to the aforesaid state, and the commissioners aforesaid, were thereby directed to proceed on such real and personal estate, in like manner as on the estate of the persons therein first mentioned, any thing contained in the said recited acts, to the contrary notwithstanding. And the said *John Eaton*, further saith, that the said plaintiffs, and each of them, before the making of the said acts, passed at Halifax, had refused, and each of them had refused, to take the oath of allegiance in the said first recited acts prescribed, that is to say, on the ——— day of ———, in the year of our lord, 1777, in the state aforesaid, at the county of Halifax : and that therefore, they the said plaintiffs were compelled, and each of them was compelled, to leave the said state, by virtue of, and in pursuance of the first of the said recited acts ; that is to say, at the county of Halifax aforesaid ; and that they the said plaintiffs at the time of the making of the said act, passed at Halifax, had not appointed any lawful a-

gents or attornies, to receive and give discharges for the debts due and owing to them, from the inhabitants of the state aforesaid. And the said *John Eaton*, further saith, that he the said *John Eaton*, at the time of the making of the aforesaid act, passed at Halifax, and continually before that time, from the day of the date of the writing obligatory aforesaid, had been an inhabitant of the aforesaid state, living and residing within the same, to wit, at the county of Halifax aforesaid. And to the said *John Eaton* saith, that by means of the premises, and by force of the acts of the General Assembly of the state aforesaid, in such cases made and provided, that the debt aforesaid, in the declaration aforesaid, by the said *John* and *Archibald Hamilton* demanded of him was, and is, confiscated and fully and absolutely forfeited to the aforesaid state of North-Carolina, and this he is ready to verify. Wherefore he prays judgment whether the said *John Hamilton* and *Archibald Hamilton*, ought to have or maintain their said action against him.

IV. AND the said *John Eaton*, for further plea in bar, saith, that by the aforesaid act, passed at Halifax, reciting that whereas many persons who, before that time, refused to take the oath of allegiance, to this state, and were compelled to leave the same, in consequence thereof, by virtue of an act of Assembly passed at Newbern, in April, in the year of our lord, 1777, entitled, *An act for declaring what crimes and practices against the state, shall be treason, and what misprision of treason, and providing punishment adequate to crimes of both classes, and for preventing the dangers which may arise from persons disaffected to the state;* and of another act, passed at Newbern, in November, in the year 1777, to amend the aforesaid act, had failed, or neglected, to sell or convey their real estates, agreeable to the said acts, and to appoint lawful agents and attornies to receive and give discharges, for debts due and owing by the inhabitants of the said state, to persons who so departed therefrom, whereby many lands of the persons last described were then yet undisposed of, and still continued to be and remain to the use of the same, and many well meaning people were defeated of an opportunity to discharge such debts due as aforesaid; in consideration thereof, it was enacted that all such lands of the persons described in these said last mentioned acts which had not then been sold and disposed of *bona fide* for a valuable consideration actually paid, and all debts, money and personal property belonging to the same, then not yet collected and appropriated, according to the directions of the said acts therein recited, should be and thereby were declared to be forfeited to the aforesaid state, and the commissioners aforesaid, were thereby directed to proceed on such real and personal estate, in like manner, as on the estate of the persons therein first mentioned; any thing contained in the said recited acts to the contrary notwithstanding. And the said *John Eaton* further saith that the said plaintiffs, and each of

them, before the making of the said acts, passed at Halifax, had refused and each of them had refused to take the oath of allegiance, in the said first recited acts prescribed, *that is to say*, on the — day — in the year of our lord 1777, in the state aforesaid, at the county of Halifax, and that therefore they the said plaintiffs were compelled, and each of them was compelled to leave the said state, by virtue of and in pursuance of the first of the said recited acts, *that is to say*, at the county of Halifax aforesaid, and that they the said plaintiffs, at the time of the making of the said act passed at Halifax, had not appointed any lawful agents or attorneys, to receive and give discharges, for the debts due and owing to them from the inhabitants of the state aforesaid: and the said *John Eaton*, further saith, that he the said *John Eaton*, at the time of the making of the aforesaid act, passed at Halifax, and continually before that time, from the day of the date of the writing obligatory aforesaid, had been an inhabitant of the aforesaid state, living and residing within the same, *to wit*, at the county of Halifax aforesaid. And so the said *John Eaton* saith, that by means of the premises and by force of the acts of the General Assembly of the state aforesaid, in such cases made and provided, that the debt aforesaid, in the declaration aforesaid, by the said *John Hamilton* and *Archibald Hamilton* demanded of him, was, and is confiscated, and fully and absolutely forfeited, to the aforesaid state of North-Carolina: and this he is ready to verify. Wherefore he prays judgment, whether the said *John Hamilton* and *Archibald Hamilton* ought to have or maintain their said action against him.

JOHN HAYWOOD, *pro Def.*

REPLICATIONS.

I. AND the said *Archibald* and *John Hamilton*, as to the plea of the said *John Eaton* by him first above pleaded in bar; say that they, by reason of any thing in that plea alledged, ought not to be barred from having or maintaining their said action thereof against him. Because, protesting that, that plea and the matters therein contained are not sufficient in law to bar the said *Archibald* and *John Hamilton* from having or maintaining their said action against the said *John Eaton*, for replication they, the said *Archibald* and *John Hamilton*, say that true it is that, on the said fourth day of July, in the said year 1776, and from thence continually afterwards, until the said thirtieth day of November, in the said year 1782, there was an open war between the said king of Great-Britain and the United States of America aforesaid, and that on the said fourth day of July, in the said year 1776, the said *Archibald* and *John Hamilton* were residents and inhabitants, and each of them was a resident and inhabitant of this state, and continued to reside and inhabit within the same until the said twentieth day of October, in the year 1777 aforesaid. Yet the said *Archibald* and *John Hamilton* further say that, by an act made and provided in a General Assembly of the state of North-Carolina

line, begun and held at *Newbern* aforesaid, in the said state of North-Carolina, and now in the district of North-Carolina, and within the jurisdiction of this court, after the said fourth day of July, in the year 1776 aforesaid; and before the time of making the said writing obligatory, (*to wit*) on the eighth day of April in the year 1777 aforesaid, entitled, "*an act declaring what crimes and practices against the state shall be treason and what shall be misprision of treason and providing punishments adequate to crimes of both classes; and for preventing the dangers which may arise from persons disaffected to the state,*" (among other things) it is enacted, by the authority of the same General Assembly, that all the then late officers of the king of Great-Britain, and all persons (quakers excepted) being subjects of the said state, and then living therein, or who should thereafter come to live therein, who had traded immediately to Great-Britain or Ireland; within ten years then last past, in their own right, or acted as storekeepers, factors or agents here, or in any of the United States of America, for merchants residing in Great-Britain or Ireland, should take a certain oath of abjuration and allegiance therein mentioned, or depart out of the said state: and it is by the same act provided that all and every such person, and persons, should have liberty, and that they might also nominate and appoint an attorney or attorneys; to sell and dispose of his, or their estates for his or their own use and benefit, as by the same act (among other things) may more fully appear. And the said *Archibald* and *John Hamilton* further say that they, on the said eighth day of April, in the year 1777 aforesaid, and long before then, were, and from the time of their nativities respectively continually hitherto have been and still are, subjects of, and owing allegiance to, the said king of Great-Britain; and that they, the said *Archibald* and *John Hamilton*, on the same day and year last aforesaid, and for a long time, (*to wit*) the space of ten years before the making of the same, and until the said twentieth day of October, in the said year 1777, were merchants and copartners, living in the then state, and formerly province of North-Carolina aforesaid, and had within, and during the said space of ten years last past, before the making of the same act, traded immediately to Great-Britain, (*to wit*), at — in their own right, (*that is to say*), at the state of North-Carolina aforesaid, and now in the district of North-Carolina aforesaid, and within the jurisdiction of this court. And after the said eighth day of April, in the year 1777 aforesaid; and before the said twentieth day of October, in the said year 1777, (*to wit*), on the same — day of — in the said year 1777, at North-Carolina aforesaid, now in the said district of North-Carolina and within the jurisdiction of this court, the said *John Eaton* made his said writing obligatory in the said declaration mentioned, and by the same writing obligatory, he the said *John Eaton*, then and there *bona fide* contracted the said debt in the said declaration mentioned. And the said *Archibald* and *John Hamilton* further say that, after the said eighth day of April, in the

said year 1777, and after the making of the said writing obligatory, (*to wit,*) on the said twentieth day of October, in the year 1777 aforesaid, they the said *Archibald* and *John Hamilton*, then being merchants and copartners as aforesaid, and having lived, resided and inhabited, and then living, residing and inhabiting in the state of North-Carolina aforesaid, in the manner herein before mentioned, and having traded immediately to Great-Britain aforesaid, within and during ten years last past before the making of the same act as aforesaid, and then being the subjects of, and owing allegiance to the said king of Great-Britain as aforesaid. And the said *John Eaton* having contracted the said debt *bona fide* with the said *Archibald* and *John Hamilton* aforesaid; and the said *Archibald* and *John Hamilton*, being creditors in that respect as aforesaid, did withdraw themselves from the said state, and from the United States of America aforesaid, and they, and each of them did remove and depart out of the said state, (*to wit,*) to Europe, in conformity to the tenor, true intent and meaning of, and in obedience to, the same last mentioned act of the General Assembly; and continually afterwards from the said twentieth day of October, in the said year 1777, until the termination of the said war, the said *Archibald* and *John Hamilton* resided beyond the limits of the said United States, under the sovereignty and jurisdiction of the said King, owing and acknowledging their allegiance to him; and during all the time last aforesaid, they the said *Archibald* and *John Hamilton* did not, nor did either of them, return unto the said state to be admitted as citizens or a citizen thereof. And the said *Archibald* and *John Hamilton* further say, that afterwards such act of the General Assembly held at Halifax, on the eighteenth day of October, in the year 1779 aforesaid, entitled, *an act to carry into effect an act passed at Newbern in the year 1777, entitled, an act for confiscating the property of all such persons as are inimical to this or the United States, and of such persons as shall not within a certain time therein mentioned appear and submit to the state whether they shall be received as citizens thereof, and of such persons as shall so appear and shall not be admitted as citizens, and for other purposes therein mentioned, and for other purposes,* was made as in the same plea alledged, and that on the day of the making of the aforesaid act, at Halifax, and also from the day of the date of the said writing obligatory and from thence continually afterwards, until the day of pleading the same plea in bar, the said *John Eaton* hath been an inhabitant of the said state, being and residing within the same, (*to wit,*) at the county of Halifax aforesaid, and that after the making of the said act, passed at Halifax, the court of pleas and quarter-sessions for the said county, held for the said county, at the town of Halifax in the said county on the — day of — in the said year 1780, duly appointed the said *Samuel Weldon*, *William Wooting* and *William Montfort*, to be commissioners for the purpose aforesaid, in the said act expressed, for the said county of Halifax, who then and there accepted

the said appointment, and having duly qualified themselves for the same, by performing and complying with the several requisites by law prescribed in such case, then and there took upon themselves the exercise thereof; and that the said commissioners, after their said appointments and qualifications aforesaid, caused the said *John Eaton* to be summoned, according to the directions of the aforesaid act, in the same plea in bar mentioned, to appear before them, on the said fifteenth day of April, in the said year 1780, in the county aforesaid, to give in on oath an account (amongst other things) of all and every the sum and sums of money aforesaid, by him due and owing to the persons aforesaid: whereupon the said *John Eaton*, then and there appeared before the said commissioners, and rendered to them on oath an account of the sum of four hundred and sixty pounds, being the principal and interest then due on the said writing obligatory above specified; and that afterwards, (*to wit,*) on the same day and year last aforesaid, in the county aforesaid, he, the said *John Eaton*, by the commissioners aforesaid was required to pay them the said sum of £. 460, according to the directions and intent of the act aforesaid in the same plea in bar mentioned: and that he the said *John Eaton* thereupon then and there paid to the said commissioners the aforesaid sum of four hundred and sixty pounds, being the whole sum mentioned in the condition aforesaid, and all the interest thereupon then due: and that thereupon the said commissioners, then and there, made and delivered to him the said *John Eaton* a receipt and discharge of and for the sum aforesaid by him paid as aforesaid, according to the directions of the act aforesaid in the same plea in bar mentioned. Yet the said *Archibald* and *John Hamilton* further say, that by the definitive treaty of peace between the United States of America aforesaid and his Britannic Majesty aforesaid, made and done at Paris, after the said fourth day of July, in the said year 1776, and after the time of making of the said writing obligatory, and after the departure of the said *Archibald* and *John Hamilton*, in conformity and obedience to the act of the General Assembly herein before pleaded, and after the passing of the said act of the said General Assembly in the same plea in bar pleaded, (*to wit,*) on the third day of September, in the year of our lord 1783, it is (among other things) stipulated and agreed that creditors on either sides should meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts theretofore contracted, as by the same treaty, (among other things) may more fully appear. And the said *Archibald* and *John Hamilton* further in fact say, that they at the time of the making of the said definitive treaty, and for a long time before then, (*to wit,*) on the said — day of — in the said year 1777, were, and from that same day continually hitherto have been, and still are, creditors of the said *John Eaton*, by virtue of the writing obligatory in the said declaration mentioned, in manner and form as therein is declared, and on the side of his said Britannic Majesty, within the true intent and mean-

ing of the said definitive treaty, (*that is to say,*) at the state of North-Carolina aforesaid, now in the district of North-Carolina, and within the jurisdiction of this court, and that they, the said *Archibald* and *John Hamilton*, at the time of the making of the said definitive treaty, at and before the passing of the said act of the General Assembly in the same plea in bar pleaded, and at and before the departing of the said *Archibald* and *John Hamilton*, in conformity to the act of the General Assembly herein before pleaded, by way of reply, and at and before the time of the making of the said writing obligatory in the said declaration mentioned; and at and before the time of the making of the said act herein before pleaded, by way of reply, and on the said fourth day of July in the said year 1776, and long before, then and from the times of their nativities respectively, were, and from thence continually hitherto have been, and still are, subjects of his said Britannic majesty, owing and acknowledging their allegiance and obedience to him: And that the said debt, in the said declaration mentioned, was contracted, and the said writing obligatory therein also mentioned made and executed by the said *John Eaton*, *bona fide*, before the time of the making of the said definitive treaty, (*to wit;*) on the said — day of — in the said year 1777, and the same debt still remains wholly due and owing from the said *John Eaton* to the said *Archibald* and *John Hamilton*, and hath not, nor hath any part thereof, been paid or satisfied to them, or either of them; (*that is to say,*) at the state of North-Carolina aforesaid, and in the said district of North-Carolina, and within the jurisdiction of this court: And the said *Archibald* and *John Hamilton* further say that by the constitution ordained and established by the people of the United States for the United States of America, done in convention after the said third day of September, in the said year 1783, (*to wit;*) on the seventeenth day of September in the year of our lord 1787, it is (among other things) expressly declared that all treaties which were then made, or which should be made, under the authority of the United States, should be the supreme law of the land, any thing in the said constitution or laws of any state to the contrary notwithstanding, as by the same constitution more fully appears. And the said *Archibald* and *John Hamilton* further say that, by an act made and provided in a General Assembly of the state of North-Carolina begun and held at *Tarborough*, now in the district of North-Carolina aforesaid, and within the jurisdiction of this court, after the said third day of September, in the said year one thousand seven hundred and eighty three, and after the said seventeenth day of September in the said year 1787, (*to wit;*) on the eighteenth day of November, in the year of our lord 1787, and in the twelfth year of the independence of the said state, entitled, *an act declaring the treaty of peace between the United States of America and the king of Great-Britain to be part of the law of the land*, it is enacted by the authority of the same General Assembly, that the articles of the definitive treaty between the

United States of America and the king of Great-Britain, were thereby declared to be part of the law of the land. And it was also thereby further enacted by the same authority, that the courts of law and equity were thereby declared in all cases and questions cognizable by them, respecting the said treaty, to judge accordingly; as by the same act more fully appears. Wherefore, for that the said *Archibald* and *John Hamilton* were merchants, and were and are subjects of the said king of Great-Britain, and creditors on his side as aforesaid; and the said debt was *bona fide* contracted before the making of the said definitive treaty, and the ordaining and establishing of the said constitution, and the passing of the said act declaring the said definitive treaty to be part of the law of the land: they, the said *Archibald* and *John Hamilton*, pray judgment and their said debt, together with their damages, occasioned by the detaining of the same, to be adjudged to them, &c.

II. AND the said *Archibald* and *John Hamilton*, as to the said plea of the said *John Eaton*, by him *secondly* above pleaded in bar, say that they, by reason of any thing in that same plea alledged, ought not to be barred from having or maintaining their said action thereof against him; because, protesting that, that same plea and the matters therein contained are not sufficient in law to bar the said *Archibald* and *John Hamilton* from having or maintaining their said action against the said *John Eaton*; for replication they, the said *Archibald* and *John Hamilton* say that true it is that on the said fourth day of July, in the year 1776, and continually afterwards, until the said third day of September, in the said year 1782, a war was prosecuted and carried on against the United States of America by the king of Great-Britain: and that, in the time of the continuance thereof, such act was made and passed by and at a General Assembly of the state of North-Carolina, held at *Newbern* aforesaid, on the said fifteenth day of November in the year 1777 aforesaid, as in the same plea in bar in that behalf is alledged; and that afterwards the said other act was made and passed by and at the General Assembly of the said state of North-Carolina, held at *Halifax* aforesaid, on the said eighteenth day of October in the year 1779 aforesaid, as in the same plea in bar in that behalf is also alledged; and that in the time when the said war was continuing, and upon the said fourth day of July, in the said year 1776, and continually afterwards, until the time of the departure of the said *Archibald* and *John Hamilton* from the said state herein after mentioned, they, the said *Archibald* and *John Hamilton* were residents, and each of them was a resident, inhabiting and residing within the limits of the said state, (*to wit,*) in the county of *Halifax*, and that the said *John Eaton*, at the times of the passing the acts in the same plea in bar mentioned, and each of them, and long before that time, (*to wit,*) from the day of the date of the said writing obligatory, until the day of pleading the same plea in bar, hath been conti-

nually an inhabitant and resident of this state, dwelling and residing within the same, (*to wit,*) at the county of Halifax aforesaid. Yet the said Archibald and John Hamilton further say, that by an act made and provided in a General Assembly of the state of North-Carolina, begun and held at Newbern aforesaid, in the said state of North-Carolina, and now in the district of North-Carolina, and within the jurisdiction of this court, whilst the war was continuing, and after the said fourth day of July, in the year 1776 aforesaid, and before the said eighteenth day of October, in the said year 1779, and before the said fifteenth day of November, in the said year 1777, and before the time of the making of the said writing obligatory, (*to wit,*) on the eighth day of April, in the said year 1777, entitled, *an act declaring what crimes and practices against the state shall be treason and what shall be misprision of treason, and providing punishments adequate to crimes of both classes, and for preventing the dangers which may arise from persons disaffected to the state,* (among other things) it is enacted by the authority of the same General Assembly, that all the then late officers of the king of Great-Britain, and all persons (quakers excepted) being subjects of the said state, then living therein, or who should thereafter come to live therein, who had traded immediately to Great-Britain or Ireland, within ten years then last past, in their own right, or acted as factors, storekeepers or agents here, or in any of the United States of America, for merchants residing in Great-Britain or Ireland, should take a certain oath of abjuration and allegiance therein mentioned, or depart out of the said state. And it is by the same act provided, that all and every such person and persons should have liberty, and that they might also nominate and appoint an attorney or attorneys, to sell and dispose of his or their estate for his or their use and benefit, as by the same act (among other things) may more fully appear. And the said Archibald and John Hamilton further say, that they, on the said eighth day of April, in the year one thousand seven hundred and seventy seven aforesaid, and long before then, were, and from the time of their nativities respectively, continually hitherto have been, and still are, subjects of, and owing allegiance to, the said king of Great-Britain. And that they, on the same day and year last aforesaid, and for a long time (*to wit*) for the space of ten years before the making of the same act last mentioned, and until the said first day of September, in the said year one thousand seven hundred and seventy seven, were merchants and copartners, living in the then state, and formerly province of North-Carolina aforesaid, and had within and during the said space of ten years last past, before the making of the same last mentioned act, traded immediately to Great-Britain, in their own right (*that is to say*) at the state of North-Carolina aforesaid, and now in the district of North-Carolina aforesaid, and within the jurisdiction of this court: and after the said eighth day of April, in the said year 1777, and before the said first day of September in the same year,

(*to wit,*) on the said — day of — in the same year, at North-Carolina aforesaid, and now in the district of North-Carolina aforesaid, and within the jurisdiction of this court, he the said *John Eaton*, made his said writing obligatory, sealed with the seal of the said *John Eaton*, and the date whereof is the same day and year; and by the same writing, he the said *John Eaton* then and there *bona fide* contracted the said debt, in the said declaration mentioned. And the said *Archibald* and *John Hamilton* further say, that whilst the said war was continuing, and after the said fourth day of July, in the said year 1776, and after the said eighth day of April, in the said year 1777, and after the making of the said writing obligatory, and before the said fifteenth day of October, in the said year 1779, and before the said fifteenth day of November, in the said year 1777, (*to wit,*) on the said first day of September, in the said year 1777, they the said *Archibald* and *John Hamilton*, then being merchants and copartners as aforesaid, and having lived, resided and inhabited, and then living, residing and inhabiting in North-Carolina aforesaid, in the manner herein before alledged, and having traded immediately to Great-Britain aforesaid, within, and during ten years last past, before the making of the same last mentioned act, as herein before alledged, and then being the subjects of, and owning and acknowledging allegiance to, the said king of Great-Britain as aforesaid, and the said *John Eaton* having contracted the said debt *bona fide* with the said *Archibald* and *John Hamilton* as aforesaid, and the said *Archibald* and *John Hamilton* being creditors in that respect as aforesaid, did withdraw themselves, and each of them did withdraw himself from the said state, and remove and depart out of the said state, (*to wit,*) to Europe, in conformity to the tenor, true intent and meaning of, and in obedience to, the same last mentioned act of the General Assembly; and continually afterwards, from the said first day of September, in the said year 1777, and at the time of making of the said act, in the same plea secondly above pleaded in bar first mentioned, and also at the time of making of the said act in the same plea secondly above pleaded in bar last mentioned, and at the respective times of the making of each of them, they the said *Archibald* and *John Hamilton* resided beyond the limits of the United States of America, under the sovereignty and jurisdiction of the said king, owing and acknowledging their allegiance to him, and they the said *Archibald* and *John Hamilton* had not, nor had either of them, at the time of the making the said act in the same plea secondly above pleaded in bar last mentioned, appeared before any General Assembly of the said state, to be, nor had they or either of them after their departure from the said state as aforesaid ever at any time after been, admitted a citizen or citizens thereof. And they the said *Archibald* and *John Hamilton* further say, that by the definitive treaty of peace between the United States of America aforesaid and his

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 Britannic Majesty aforesaid, made and done at Paris, after the said fourth day of July, in the said year 1776, and after the time of the making of the said writing obligatory, and after the departure of the said *Archibald* and *John Hamilton*, in conformity and obedience to the act of the General Assembly herein before pleaded, and after the passing of the act of the General Assembly in the same plea in bar *secondly* above pleaded first mentioned, and after the passing of the act of the General Assembly in the same plea in bar *secondly* above pleaded last mentioned, (*to wit,*) on the third day of September, in the year of our lord one thousand seven hundred and eighty-three, it is (among other things) stipulated and agreed, that creditors on either side should meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts theretofore contracted, as by the same treaty (among other things) may more fully appear. And the said *Archibald* and *John Hamilton* further in fact say, that they, at the time of the making of the said definitive treaty, and for a long time before, then, (*to wit,*) on the said — day of —, in the said year 1777, were, and from that same day, continually hitherto have been, and still are, creditors of the said *John Eaton*, by virtue of the said writing obligatory, in the said declaration mentioned, in manner and form, as therein is declared; and on the side of his said Britannic Majesty, within the true intent and meaning of the said definitive treaty, (*that is to say,*) at the State of North-Carolina aforesaid, and now in the said district of North-Carolina, and within the jurisdiction of this court: and that they, the said *Archibald* and *John Hamilton*, at the time of the making of the said definitive treaty, and at and before the passing of the said act of the General Assembly, in the same plea in bar *secondly* above pleaded last mentioned, and at and before the passing of the said act of the General Assembly in the said plea in bar *secondly* above pleaded, first mentioned, and at and before the departing of the said *Archibald* and *John Hamilton*, in conformity to the said act of the General Assembly herein before pleaded by way of reply, and at and before the time of the making of the said writing obligatory in the said declaration mentioned, and at and before the time of the making of the said act of the General Assembly herein before pleaded by way of reply, and on the said fourth day of July, in the said year 1776, and long before, then, and from the times of their nativities respectively were, and from thence continually hitherto have been, and still are subjects of his Britannic Majesty, owing and acknowledging their allegiance to him. And that the said debt in the said declaration mentioned was contracted, and the said writing obligatory therein mentioned was executed by the said *John Eaton*, *bona fide*, before the time of the making of the said definitive treaty, (*to wit,*) on the said — day of — in the said year 1777, and that the same debt still remains wholly due and owing from the said *John Eaton* to the said *Archibald* and *John Hamilton*, and hath not, nor hath any part thereof been paid or satisfied to them, or either

of them, (*that is to say,*) at the state of North-Carolina aforesaid, and now in the said district of North-Carolina, and within the jurisdiction of this court. And the said *Archibald* and *John Hamilton* further say that by the constitution ordained and established by the people of the United States for the United States of America, done in convention after the said third day of September, in the said year 1783, (*to wit,*) on the seventeenth day of September in the year of our lord 1787, it is (among other things) expressly declared that all treaties which were then made, or which should be made, under the authority of the United States, should be the supreme law of the land, any thing in the said constitution or laws of any state to the contrary notwithstanding; as by the same constitution more fully appears. And the said *Archibald* and *John Hamilton* further say that, by an act made and provided in a General Assembly of the state of North-Carolina begun and held at *Farmborough*, now in the district of North-Carolina aforesaid, and within the jurisdiction of this court, after the said third day of September, in the said year one thousand seven hundred and eighty three, and after the said seventeenth day of September in the said year 1787, (*to wit,*) on the eighteenth day of November, in the year of our lord 1787, and in the twelfth year of the independence of the said state, entitled, *an act declaring the treaty of peace between the United States of America and the king of Great-Britain to be part of the law of the land*, it is enacted by the authority of the same General Assembly, that the articles of the definitive treaty between the United States of America and the king of Great-Britain, were thereby declared to be part of the law of the land. And it was also thereby further enacted by the same authority, that the courts of law and equity were thereby declared in all cases and questions cognizable by them, respecting the said treaty, to judge accordingly; as by the same act more fully appears. Wherefore, for that the said *Archibald* and *John Hamilton* were merchants, and were and are subjects of the said king of Great-Britain, and creditors on his side as aforesaid; and the said debt was *bona fide* contracted before the making of the said definitive treaty, and the ordaining and establishing of the said constitution, and the passing of the said act declaring the said definitive treaty to be part of the law of the land; they, the said *Archibald* and *John Hamilton*, pray judgment and their said debt, together with their damages, occasioned by the detaining of the same, to be adjudged to them, &c.

III. AND the said *Archibald* and *John Hamilton*, as to the plea of the said *John Eaton* by him thirdly above pleaded in bar; say that they, by reason of any thing in that plea alledged, ought not to be barred from having or maintaining their said action thereof against him. Because, protesting that, that plea and the matters therein contained are not sufficient in law to bar the said *Archibald* and *John Hamilton* from having or maintaining their said action against the said *John*

them, before the making of the said acts, passed at Halifax, had refused and each of them had refused to take the oath of allegiance to the said first recited acts prescribed, *that is to say*, on the — day — in the year of our lord 1777, in the state aforesaid, at the county of Halifax, and that therefore they the said plaintiffs were compelled, and each of them was compelled to leave the said state, in virtue of and in pursuance of the first of the said recited acts, *that is to say*, at the county of Halifax aforesaid, and that they the plaintiffs, at the time of the making of the said act passed at Halifax, had not appointed any lawful agents or attorneys, to receive and give discharges, for the debts due and owing to them from the inhabitants of the state aforesaid: and the said *John Eaton*, swears, that he the said *John Eaton*, at the time of the making of the said act, passed at Halifax, and continually before that time, on the day of the date of the writing obligatory aforesaid, had been and was a habitant of the aforesaid state, living and residing within the same, *to wit*, at the county of Halifax aforesaid. And to the said *John Eaton* he swears, that by means of the premises and by force of the acts of the General Assembly of the state aforesaid, in such cases made and provided that the debt aforesaid, in the declaration aforesaid, by the said *John Hamilton* and *Archibald Hamilton* demanded of him, was, and is confiscated, and fully and absolutely forfeited, to the aforesaid state of North-Carolina: and this he is ready to verify. Wherefore he prays judgment, whether the said *John Hamilton* and *Archibald Hamilton* ought to have or maintain their said action against him.

JOHN HAYWOOD, *pro Def.*

REPLICATIONS.

I. AND the said *Archibald* and *John Hamilton*, as to the plea of the said *John Eaton* by him first above pleaded in bar; say that they by reason of any thing in that plea alledged, ought not to be barred from having or maintaining their said action thereof against him. He cause, protesting that, that plea and the matters therein contained are not sufficient in law to bar the said *Archibald* and *John Hamilton* from having or maintaining their said action against the said *John Eaton*, for replication they, the said *Archibald* and *John Hamilton*, say that true it is that, on the said fourth day of July, in the said year 1776, and from thence continually afterwards, until the said twentieth day of November, in the said year 1782, there was an open war between the said king of Great-Britain and the United States of America aforesaid, and that on the said fourth day of July, in the said year 1776, the said *Archibald* and *John Hamilton* were residents and inhabitants, and each of them was a resident and inhabitant in this state, and continued to reside and inhabit within the same until the said twentieth day of October, in the year 1777 aforesaid. Yet the said *Archibald* and *John Hamilton* further say that, by the said acts made and provided in a General Assembly of the state of North-Carolina

er, in the said year one thousand seven hundred and eighty three, and after the said seventeenth day of September in the said year 1787, *scilicet*, on the eighteenth day of November, in the year of our lord 1787, and in the twelfth year of the independence of the said state, entitled, *an act declaring the treaty of peace between the United States of America and the king of Great-Britain to be part of the law of the land*, it is enacted by the authority of the said General Assembly, that the articles of the definitive treaty between the United States of America and the king of Great-Britain, were thereby declared to be part of the law of the land. And it was also hereby further enacted by the same authority, that the courts of law and equity were thereby declared in all cases and questions cognizable by them, respecting the said treaty, to judge accordingly; as by the same act more fully appears. Wherefore, for that the said *Archibald* and *John Hamilton* were merchants, and were and are subjects of the said king of Great-Britain, and creditors on his side as aforesaid; and the said debt was *bona fide* contracted before the making of the said definitive treaty, and the ordaining and establishing of the said constitution, and the passing of the said act declaring the said definitive treaty to be part of the law of the land; they, the said *Archibald* and *John Hamilton*, pray judgment and their said debt, together with their damages, occasioned by the determining of the same, to be adjudged to them, &c.

IV. AND the said *Archibald* and *John Hamilton*, as to the said plea of the said *John Eaton*, by him *fourthly* above pleaded in bar, say that they, by reason of any thing in that same plea alledged, ought not to be barred from having or maintaining their said action thereof against him; because, protesting that, that same plea and the matters therein contained are not sufficient in law to bar the said *Archibald* and *John Hamilton* from having or maintaining their said action against the said *John Eaton*; for replication they, the said *Archibald* and *John Hamilton* say that true it is that on the said fourth day of July, in the year 1776, and continually afterwards, until the said thirtieth day of November, in the said year 1782, there was an open war between the said king of Great-Britain and the United States of America aforesaid, and that on the said fourth day of July, in the said year 1776, the said *Archibald* and *John Hamilton* were residents and inhabitants, and each of them was a resident and inhabitant of this state, and continued to reside and inhabit within the same until the said 20th day of October, in the said year 1777. Yet the said *Archibald* and *John Hamilton* further say, that by an act made and provided in a General Assembly of the state of North-Carolina, begun and held at *Newbern* aforesaid, in the said state of North-Carolina, and now in the district of North-Carolina, and within the jurisdiction of this court, after the said fourth day of July, in the year one thousand seven hundred and seventy-six aforesaid, and before the time of the making of the said writing obligatory,

said year 1777, and after the making of the said writing obligatory, (*to wit*,) on the said twentieth day of October, in the year 1777 aforesaid, they the said *Archibald* and *John Hamilton*, the being merchants and copartners as aforesaid, and having lived, resided and inhabited, and then living, residing and inhabiting in the state of North-Carolina aforesaid, in the manner herein before mentioned, and having traded immediately to Great-Britain aforesaid, within and during ten years last past before the making of the same act as aforesaid, and then being the subjects of, and owing allegiance to the said king of Great-Britain as aforesaid. And the said *John Eaton* having contracted the said debt *bona fide* with the said *Archibald* and *John Hamilton* aforesaid; and the said *Archibald* and *John Hamilton*, being creditors in that respect as aforesaid, did withdraw themselves from the said state, and from the United States of America aforesaid, and they, and each of them did remove and depart out of the said state, (*to wit*,) to Europe, in conformity to the tenor, true intent and meaning of, and in obedience to, the same last mentioned act of the General Assembly; and continually afterwards from the said twentieth day of October, in the said year 1777, until the termination of the said war, the said *Archibald* and *John Hamilton* resided beyond the limits of the said United States, under the sovereignty and jurisdiction of the said King, owing and acknowledging their allegiance to him; and during all the time last aforesaid, they the said *Archibald* and *John Hamilton* did not, nor did either of them, return unto the said state to be admitted as citizens or a citizen thereof. And the said *Archibald* and *John Hamilton* further say, that afterwards such act of the General Assembly held at Halifax, on the eighteenth day of October, in the year 1779 aforesaid, entitled, *an act to carry into effect an act passed at Newbern in the year 1777, entitled, an act for confiscating the property of all such persons as are inimical to this or the United States, and of such persons as shall not within a certain time therein mentioned appear and submit to the state whether they shall be received as citizens thereof, and of such persons as shall so appear and shall not be admitted as citizens, and for other purposes therein mentioned, and for other purposes,* was made as in the same plea alledged, and that on the day of the making of the aforesaid act, at Halifax, and also from the day of the date of the said writing obligatory and from thence continually afterwards, until the day of pleading the same plea in bar, the said *John Eaton* hath been an inhabitant of the said state, being and residing within the same, (*to wit*,) at the county of Halifax aforesaid, and that after the making of the said act, passed at Halifax, the court of pleas and quarter-sessions for the said county, held for the said county, at the town of Halifax in the said county on the — day of — in the said year 1780, duly appointed the said *Samuel Weldon*, *William Wooting* and *William Montfort*, to be commissioners for the purpose aforesaid, in the said act expressed, for the said county of Halifax, who then and there accepted

the said appointment, and having duly qualified themselves for the same, by performing and complying with the several requisites by law prescribed in such case, then and there took upon themselves the exercise thereof; and that the said commissioners, after their said appointments and qualifications aforesaid, caused the said *John Eaton* to be summoned, according to the directions of the aforesaid act, in the same plea in bar mentioned, to appear before them, on the said fifteenth day of April, in the said year 1780, in the county aforesaid, to give in on oath an account (amongst other things) of all and every the sum and sums of money aforesaid, by him due and owing to the persons aforesaid: whereupon the said *John Eaton*, then and there appeared before the said commissioners, and rendered to them on oath an account of the sum of four hundred and sixty pounds, being the principal and interest then due on the said writing obligatory above specified; and that afterwards, (*to wit,*) on the same day and year last aforesaid, in the county aforesaid, he, the said *John Eaton*, by the commissioners aforesaid was required to pay them the said sum of £. 460, according to the directions and intent of the act aforesaid in the same plea in bar mentioned: and that he the said *John Eaton* thereupon then and there paid to the said commissioners the aforesaid sum of four hundred and sixty pounds, being the whole sum mentioned in the condition aforesaid, and all the interest thereupon then due: and that thereupon the said commissioners, then and there, made and delivered to him the said *John Eaton* a receipt and discharge of and for the sum aforesaid by him paid as aforesaid, according to the directions of the act aforesaid in the same plea in bar mentioned. Yet the said *Archibald* and *John Hamilton* further say, that by the definitive treaty of peace between the United States of America aforesaid and his Britannic Majesty aforesaid, made and done at Paris, after the said fourth day of July, in the said year 1776, and after the time of making of the said writing obligatory, and after the departure of the said *Archibald* and *John Hamilton*, in conformity and obedience to the act of the General Assembly herein before pleaded, and after the passing of the said act of the said General Assembly in the same plea in bar pleaded, (*to wit,*) on the third day of September, in the year of our lord 1783, it is (among other things) stipulated and agreed that creditors on either sides should meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts theretofore contracted, as by the same treaty, (among other things) may more fully appear. And the said *Archibald* and *John Hamilton* further in fact say, that they at the time of the making of the said definitive treaty, and for a long time before then, (*to wit,*) on the said — day of — in the said year 1777, were, and from that same day continually hitherto have been, and still are, creditors of the said *John Eaton*, by virtue of the writing obligatory in the said declaration mentioned, in manner and form as therein is declared, and on the side of his said Britannic Majesty, within the true intent and mean-

ing of the said definitive treaty, (*that is to say,*) at the state of North Carolina aforesaid, now in the district of North-Carolina, and within the jurisdiction of this court, and that they, the said *Archibald* and *John Hamilton*, at the time of the making of the said definitive treaty, at and before the passing of the said act of the General Assembly in the same plea in bar pleaded, and at and before the departing of the said *Archibald* and *John Hamilton*, in conformity to the act of the General Assembly herein before pleaded, by way of reply, and at and before the time of the making of the said writing obligatory in the said declaration mentioned; and at and before the time of the making of the said act herein before pleaded, by way of reply, and on the said fourth day of July in the said year 1776, and long before, then and from the times of their nativities respectively, were, and from thence continually hitherto have been, and still are, subjects of his said Britannic majesty, owing and acknowledging their allegiance and obedience to him: And that the said debt, in the said declaration mentioned, was contracted, and the said writing obligatory therein also mentioned made and executed by the said *John Eaton*, *bona fide*, before the time of the making of the said definitive treaty, (*to wit,*) on the said — day of — in the said year 1777, and the same debt still remains wholly due and owing from the said *John Eaton* to the said *Archibald* and *John Hamilton*, and hath not, nor hath any part thereof, been paid or satisfied to them, or either of them, (*that is to say,*) at the state of North-Carolina aforesaid, and in the said district of North-Carolina, and within the jurisdiction of this court: And the said *Archibald* and *John Hamilton* further say that by the constitution ordained and established by the people of the United States for the United States of America, done in convention after the said third day of September, in the said year 1783, (*to wit,*) on the seventeenth day of September in the year of our lord 1787, it is (among other things) expressly declared that all treaties which were then made, or which should be made, under the authority of the United States, should be the supreme law of the land, any thing in the said constitution or laws of any state to the contrary notwithstanding, as by the same constitution more fully appears. And the said *Archibald* and *John Hamilton* further say that, by an act made and provided in a General Assembly of the state of North-Carolina begun and held at *Farmborough*, now in the district of North-Carolina aforesaid, and within the jurisdiction of this court, after the said third day of September, in the said year one thousand seven hundred and eighty three; and after the said seventeenth day of September in the said year 1787, (*to wit,*) on the eighteenth day of November, in the year of our lord 1787, and in the twelfth year of the independence of the said state, entitled, *an act declaring the treaty of peace between the United States of America and the king of Great-Britain to be part of the law of the land*, it is enacted by the authority of the same General Assembly, that the articles of the definitive treaty between the

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United States of America and the king of Great-Britain, were thereby declared to be part of the law of the land. And it was also thereby further enacted by the same authority, that the courts of law and equity were thereby declared in all cases and questions cognizable by them, respecting the said treaty, to judge accordingly; as by the same act more fully appears. Wherefore, for that the said *Archibald* and *John Hamilton* were merchants, and were and are subjects of the said king of Great-Britain, and creditors on his side as aforesaid; and the said debt was *bona fide* contracted before the making of the said definitive treaty, and the ordaining and establishing of the said constitution, and the passing of the said act declaring the said definitive treaty to be part of the law of the land: they, the said *Archibald* and *John Hamilton*, pray judgment and their said debt, together with their damages, occasioned by the detaining of the same, to be adjudged to them, &c.

II. AND the said *Archibald* and *John Hamilton*, as to the said plea of the said *John Eaton*, by him *secondly* above pleaded in bar, say that they, by reason of any thing in that same plea alledged, ought not to be barred from having or maintaining their said action thereof against him; because, protesting that, that same plea and the matters therein contained are not sufficient in law to bar the said *Archibald* and *John Hamilton* from having or maintaining their said action against the said *John Eaton*; for replication they, the said *Archibald* and *John Hamilton* say that true it is that on the said fourth day of July, in the year 1776, and continually afterwards, until the said third day of September, in the said year 1782, a war was prosecuted and carried on against the United States of America by the king of Great-Britain: and that, in the time of the continuance thereof, such act was made and passed by and at a General Assembly of the state of North-Carolina, held at *Newbern* aforesaid, on the said fifteenth day of November in the year 1777 aforesaid, as in the same plea in bar in that behalf is alledged; and that afterwards the said other act was made and passed by and at the General Assembly of the said state of North-Carolina, held at *Halifax* aforesaid, on the said eighteenth day of October in the year 1779 aforesaid, as in the same plea in bar in that behalf is also alledged; and that in the time when the said war was continuing, and upon the said fourth day of July, in the said year 1776, and continually afterwards, until the time of the departure of the said *Archibald* and *John Hamilton* from the said state herein after mentioned, they, the said *Archibald* and *John Hamilton* were residents, and each of them was a resident, inhabiting and residing within the limits of the said state, (*to wit,*) in the county of *Halifax*, and that the said *John Eaton*, at the times of the passing the acts in the same plea in bar mentioned, and each of them, and long before that time, (*to wit,*) from the day of the date of the said writing obligatory, until the day of pleading the same plea in bar, hath been conti-

usually an inhabitant and resident of this state, dwelling and residing within the same, (*to wit,*) at the county of Halifax aforesaid. And the said Archibald and John Hamilton further say, that by an act made and provided in a General Assembly of the state of North-Carolina, begun and held at Newbern aforesaid, in the said state of North-Carolina, and now in the district of North-Carolina, and within the jurisdiction of this court, whilst the war was continuing, and after the said fourth day of July, in the year 1776 aforesaid, and before the said eighteenth day of October, in the said year 1776, and before the said fifteenth day of November, in the said year 1776, and before the time of the making of the said writing obligatory, (*to wit,*) on the eighth day of April, in the said year 1777, enacted, an act declaring what crimes and practices against the state shall be treason and what shall be misprision of treason, and providing punishments adequate to crimes of both classes, and for preventing the dangers which may arise from persons disaffected to the state, (among other things) it is enacted by the authority of the same General Assembly, that all the then late officers of the king of Great-Britain, and all persons (quakers excepted) being subjects of the said state, then living therein, or who should thereafter come to live therein, who had traded immediately to Great-Britain or Ireland, within ten years then last past, in their own right, or acted as factors, storekeepers or agents here, or in any of the United States of America, for merchants residing in Great-Britain or Ireland, should take a certain oath of abjuration and allegiance therein mentioned, or depart out of the said state. And it is by the same act provided, that all and every such person and persons should have liberty, and that they might also nominate and appoint an attorney or attorneys, to sell and dispose of his or their estate for his or their use and benefit, as by the same act (among other things) may more fully appear. And the said Archibald and John Hamilton further say, that they, on the said eighth day of April, in the year one thousand seven hundred and seventy seven aforesaid, and long before then, were, and from the time of their nativities respectively, continually hitherto have been, and still are, subjects of, and owing allegiance to, the said king of Great-Britain. And that they, on the same day and year last aforesaid, and for a long time (*to wit*) for the space of ten years before the making of the same act last mentioned, and until the said first day of September, in the said year one thousand seven hundred and seventy seven, were merchants and copartners, living in the then state, and formerly province of North-Carolina aforesaid, and had within and during the said space of ten years last past, before the making of the same last mentioned act, traded immediately to Great-Britain, in their own right (*that is to say*) at the state of North-Carolina aforesaid, and now in the district of North-Carolina aforesaid, and within the jurisdiction of this court: and after the said eighth day of April, in the said year 1777, and before the said first day of September in the same year,

(*to wit,*) on the said — day of — in the same year, at North-Carolina aforesaid, and now in the district of North-Carolina aforesaid, and within the jurisdiction of this court, he the said *John Eaton*, made his said writing obligatory, sealed with the seal of the said *John Eaton*, and the date whereof is the same day and year; and by the same writing, he the said *John Eaton* then and there *bona fide* contracted the said debt, in the said declaration mentioned. And the said *Archibald* and *John Hamilton* further say, that whilst the said war was continuing, and after the said fourth day of July, in the said year 1776, and after the said eighth day of April, in the said year 1777, and after the making of the said writing obligatory, and before the said fifteenth day of October, in the said year 1779, and before the said fifteenth day of November, in the said year 1777, (*to wit,*) on the said first day of September, in the said year 1777, they the said *Archibald* and *John Hamilton*, then being merchants and copartners as aforesaid, and having lived, resided and inhabited, and then living, residing and inhabiting in North-Carolina aforesaid, in the manner herein before alledged, and having traded immediately to Great-Britain aforesaid, within, and during ten years last past, before the making of the same last mentioned act, as herein before alledged, and then being the subjects of, and owning and acknowledging allegiance to, the said king of Great-Britain as aforesaid, and the said *John Eaton* having contracted the said debt *bona fide* with the said *Archibald* and *John Hamilton* as aforesaid, and the said *Archibald* and *John Hamilton* being creditors in that respect as aforesaid, did withdraw themselves, and each of them did withdraw himself from the said state, and remove and depart out of the said state, (*to wit,*) to Europe, in conformity to the tenor, true intent and meaning of, and in obedience to, the same last mentioned act of the General Assembly; and continually afterwards, from the said first day of September, in the said year 1777, and at the time of making of the said act, in the same plea secondly above pleaded in bar first mentioned, and also at the time of making of the said act in the same plea secondly above pleaded in bar last mentioned, and at the respective times of the making of each of them, they the said *Archibald* and *John Hamilton* resided beyond the limits of the United States of America, under the sovereignty and jurisdiction of the said king, owing and acknowledging their allegiance to him, and they the said *Archibald* and *John Hamilton* had not, nor had either of them, at the time of the making the said act in the same plea secondly above pleaded in bar last mentioned, appeared before any General Assembly of the said state, to be, nor had they or either of them after their departure from the said state as aforesaid ever at any time after been, admitted a citizen or citizens thereof. And they the said *Archibald* and *John Hamilton* further say, that by the definitive treaty of peace between the United States of America aforesaid and his

Britannic Majesty aforesaid, made and done at Paris, after the said fourth day of July, in the said year 1776, and after the time of the making of the said writing obligatory, and after the departure of the said *Archibald* and *John Hamilton*, in conformity and obedience to the act of the General Assembly herein before pleaded, and after the passing of the act of the General Assembly in the same plea in bar *secondly* above pleaded first mentioned, and after the passing of the act of the General Assembly in the same plea in bar *secondly* above pleaded last mentioned, (*to wit,*) on the third day of September, in the year of our lord one thousand seven hundred and eighty-three, it is (among other things) stipulated and agreed, that creditors on either side should meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts theretofore contracted, as by the same treaty (among other things) may more fully appear. And the said *Archibald* and *John Hamilton* further in fact say, that they, at the time of the making of the said definitive treaty, and for a long time before, then, (*to wit,*) on the said — day of —, in the said year 1777, were, and from that same day, continually hitherto have been, and still are, creditors of the said *John Eaton*, by virtue of the said writing obligatory, in the said declaration mentioned, in manner and form, as therein is declared; and on the side of his said Britannic Majesty, within the true intent and meaning of the said definitive treaty, (*that is to say,*) at the State of North-Carolina aforesaid, and now in the said district of North-Carolina, and within the jurisdiction of this court: and that they, the said *Archibald* and *John Hamilton*, at the time of the making of the said definitive treaty, and at and before the passing of the said act of the General Assembly, in the same plea in bar *secondly* above pleaded last mentioned, and at and before the passing of the said act of the General Assembly in the said plea in bar *secondly* above pleaded, first mentioned, and at and before the departing of the said *Archibald* and *John Hamilton*, in conformity to the said act of the General Assembly herein before pleaded by way of reply, and at and before the time of the making of the said writing obligatory in the said declaration mentioned, and at and before the time of the making of the said act of the General Assembly herein before pleaded by way of reply, and on the said fourth day of July, in the said year 1776, and long before, then, and from the times of their nativity respectively were, and from thence continually hitherto have been, and still are subjects of his Britannic Majesty, owing and acknowledging their allegiance to him. And that the said debt in the said declaration mentioned was contracted, and the said writing obligatory therein mentioned was executed by the said *John Eaton*, *bona fide*, before the time of the making of the said definitive treaty, (*to wit,*) on the said — day of — in the said year 1777, and that the same debt still remains wholly due and owing from the said *John Eaton* to the said *Archibald* and *John Hamilton*, and hath not, nor hath any part thereof been paid or satisfied to them, or either

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of them, (*that is to say,*) at the state of North-Carolina aforesaid, and now in the said district of North-Carolina, and within the jurisdiction of this court. And the said *Archibald* and *John Hamilton* further say that by the constitution ordained and established by the people of the United States for the United States of America, done in convention after the said third day of September, in the said year 1783, (*to wit;*) on the seventeenth day of September in the year of our lord 1787, it is (among other things) expressly declared that all treaties which were then made, or which should be made, under the authority of the United States, should be the supreme law of the land, any thing in the said constitution or laws of any state to the contrary notwithstanding; as by the same constitution more fully appears. And the said *Archibald* and *John Hamilton* further say that, by an act made and provided in a General Assembly of the state of North-Carolina begun and held at *Tarborough*, now in the district of North-Carolina aforesaid, and within the jurisdiction of this court, after the said third day of September, in the said year one thousand seven hundred and eighty three; and after the said seventeenth day of September in the said year 1787, (*to wit;*) on the eighteenth day of November, in the year of our lord 1787, and in the twelfth year of the independence of the said state, entitled, *an act declaring the treaty of peace between the United States of America and the king of Great-Britain to be part of the law of the land*, it is enacted by the authority of the same General Assembly, that the articles of the definitive treaty between the United States of America and the king of Great-Britain, were thereby declared to be part of the law of the land. And it was also hereby further enacted by the same authority, that the courts of law and equity were thereby declared in all cases and questions cognizable by them, respecting the said treaty, to judge accordingly; as by the same act more fully appears. Wherefore, for that the said *Archibald* and *John Hamilton* were merchants, and were and are subjects of the said king of Great-Britain, and creditors on his ideas aforesaid; and the said debt was *bona fide* contracted before the making of the said definitive treaty, and the ordaining and establishing of the said constitution, and the passing of the said act declaring the said definitive treaty to be part of the law of the land; they, the said *Archibald* and *John Hamilton*, pray judgment and their aid debt, together with their damages, occasioned by the detaining of the same, to be adjudged to them, &c.

III. AND the said *Archibald* and *John Hamilton*, as to the plea of the said *John Eaton* by him *thirdly* above pleaded in bar; say that they, by reason of any thing in that plea alledged, ought not to be barred from having or maintaining their said action thereof against him. Because, protesting that, that plea and the matters therein contained are not sufficient in law to bar the said *Archibald* and *John Hamilton* from having or maintaining their said action against the said *John*

pear. And the said *Archibald* and *John Hamilton* further in
 say, that they at the time of the making of the said definitive
 ty, and for a long time before then, (*to wit,*) on the said — day
 — in the said year 1777, were, and from that same day con-
 ally hitherto have been, and still are, creditors of the said *John*
Eaton, by virtue of the writing obligatory in the said declaration
 mentioned, in manner and form as therein is declared, and on the
 side of his said Britannic Majesty, within the true intent and mean-
 ing of the said definitive treaty, (*that is to say,*) at the state of North-
 Carolina aforesaid, now in the district of North-Carolina, and within
 in the jurisdiction of this court, and that they, the said *Archibald*
 and *John Hamilton*, at the time of the making of the said definitive
 treaty, at and before the passing of the said act of the General As-
 sembly in the same plea in bar pleaded, and at and before the
 passing of the said *Archibald* and *John Hamilton*, in conformity
 of the act of the General Assembly herein before pleaded, by way of
 reply; and at and before the time of the making of the said writing
 obligatory in the said declaration mentioned, and at and before the
 time of the making of the said act herein before pleaded, by way of
 reply, and on the said fourth day of July in the said year 1776, and
 long before, then and from the times of their natiivities respective-
 ly, were, and from thence continuously hitherto have been, and
 still are, subjects of his said Britannic Majesty, owing and acknow-
 ledging their allegiance and obedience to him. And that the said
 debt, in the said declaration mentioned, was contracted, and the
 said writing obligatory therein also mentioned made and executed
 by the said *John Eaton*, *ex fide*, before the time of the making of
 the said definitive treaty, (*to wit,*) on the said — day of — in
 the said year 1777; and the same debt still remains wholly due and
 owing from the said *John Eaton* to the said *Archibald* and *John Ha-*
milton, and hath not, nor hath any part thereof, been paid or satis-
 fied to them, or either of them, (*that is to say,*) at the state of North-
 Carolina aforesaid, and in the said district of North-Carolina, and
 within the jurisdiction of this court. And the said *Archibald* and
John Hamilton further say that by the constitution ordained and es-
 tablished by the people of the United States for the United States
 of America, done in convention after the said third day of Septem-
 ber, in the said year 1783, (*to wit,*) on the seventeenth day of Sep-
 tember in the year of our lord 1787, it is (among other things) ex-
 pressly declared that all treaties which were then made, or which
 should be made, under the authority of the United States, should
 be the supreme law of the land, any thing in the said constitution or
 laws of any state to the contrary notwithstanding, as by the same
 constitution more fully appears. And the said *Archibald* and *John*
Hamilton further say that, by an act made and provided in a Gene-
 ral Assembly of the state of North-Carolina begun and held at *Tar-*
borough, now in the district of North-Carolina aforesaid, and with-
 in the jurisdiction of this court, after the said third day of Septem-

er, in the said year one thousand seven hundred and eighty three, and after the said seventeenth day of September in the said year 1787, *quit*, on the eighteenth day of November, in the year of our lord 1787, and in the twelfth year of the independence of the said state, entitled, *an act declaring the treaty of peace between the United States of America and the king of Great-Britain to be part of the law of the land*, it is enacted by the authority of the said General Assembly, that the articles of the definitive treaty between the United States of America and the king of Great-Britain, were thereby declared to be part of the law of the land. And it was also hereby further enacted by the same authority, that the courts of law and equity were thereby declared in all cases and questions cognizable by them, respecting the said treaty, to judge accordingly; as by the same act more fully appears. Wherefore, for that the said *Archibald* and *John Hamilton* were merchants, and were and are subjects of the said king of Great-Britain, and creditors on his side as aforesaid; and the said debt was *bona fide* contracted before the making of the said definitive treaty, and the ordaining and establishing of the said constitution, and the passing of the said act declaring the said definitive treaty to be part of the law of the land; they, the said *Archibald* and *John Hamilton*, pray judgment and their said debt, together with their damages, occasioned by the declining of the same, to be adjudged to them, &c.

IV. AND the said *Archibald* and *John Hamilton*, as to the said plea of the said *John Eaton*, by him *fourthly* above pleaded in bar, say that they, by reason of any thing in that same plea alledged, ought not to be barred from having or maintaining their said action thereof against him; because, protesting that, that same plea and the matters therein contained are not sufficient in law to bar the said *Archibald* and *John Hamilton* from having or maintaining their said action against the said *John Eaton*; for replication they, the said *Archibald* and *John Hamilton* say that true it is that on the said fourth day of July, in the year 1776, and continually afterwards, until the said thirtieth day of November, in the said year 1782, there was an open war between the said king of Great-Britain and the United States of America aforesaid, and that on the said fourth day of July, in the said year 1776, the said *Archibald* and *John Hamilton* were residents and inhabitants, and each of them was a resident and inhabitant of this state, and continued to reside and inhabit within the same until the said 20th day of October, in the said year 1777. Yet the said *Archibald* and *John Hamilton* further say, that by an act made and provided in a General Assembly of the state of North-Carolina, begun and held at *Newbern* aforesaid, in the said state of North-Carolina, and now in the district of North-Carolina, and within the jurisdiction of this court, after the said fourth day of July, in the year one thousand seven hundred and seventy-six aforesaid, and before the time of the making of the said writing obligatory,

(*to wit*,) on the eighth day of April, in the said year 1777, enacted, an act declaring what crimes and practices against the state be treason and what shall be misprision of treason, and providing punishments adequate to crimes of both classes, and for preventing the dangers which may arise from persons disaffected to the state, (among other things) it is enacted by the authority of the same General Assembly, that all the then late officers of the king of Great-Britain and all persons (quakers excepted) being subjects of the said king then living therein, or who should thereafter come to live therein, who had traded immediately to Great-Britain or Ireland, within ten years then last past, in their own right, or acted as factors, factors keepers or agents here, or in any of the United States of America for merchants residing in Great-Britain or Ireland, should take certain oath of abjuration and allegiance therein mentioned, or a part out of the said state. And it is by the same act provided, that all and every such person and persons should have liberty, and that they might also nominate and appoint an attorney or attorneys, to sell and dispose of his or their estate for his or their use and benefit as by the same act (among other things) may more fully appear. And the said Archibald and John Hamilton further say, that they, on the said eighth day of April, in the year one thousand seven hundred and seventy seven aforesaid, and long before then, were, and from the time of their natiivities respectively, continually hitherto have been, and still are, subjects of, and owing allegiance to, the said king of Great-Britain. And that they, on the same day and year last aforesaid, and for a long time (*to wit*) for the space of ten years before the making of the same act last mentioned, and until the said first day of September, in the said year one thousand seven hundred and seventy seven, were merchants and copartners, living in the then state, and formerly province of North-Carolina aforesaid, and had within and during the said space of ten years last past, before the making of the same last mentioned act, traded immediately to Great-Britain, in their own right (*ibid* is it *say*) at the state of North-Carolina aforesaid, and now in the district of North-Carolina aforesaid, and within the jurisdiction of this court: and after the said eighth day of April, in the said year 1777, and before the said twentieth day of October in the said year one thousand seven hundred and seventy seven, *to wit*, on the same day of — in the said year one thousand seven hundred and seventy seven, at North-Carolina aforesaid, now in the said district of North-Carolina, and within the jurisdiction of this court, he the said John Eaton made his said writing obligatory in the said declaration mentioned, and by the same writing, he the said John Eaton then and there *bona fide* contracted the said debt in the said declaration mentioned. And the said Archibald and John Hamilton further say, that after the said eighth day of April in the said year 1777, and after the making of the said writing obligatory, *to wit*, on the said twentieth day of October, in the year 1777 aforesaid, they the

d *Archibald* and *John Hamilton*, then being merchants and partners as aforesaid, and having lived, resided and inhabited, and then living, residing and inhabiting in the state of North Carolina aforesaid, in the manner herein before mentioned, and having traded immediately to Great-Britain aforesaid, with- and during ten years last past before the making of the same as aforesaid, and then being the subjects of, and owing allegiance to, the said king of Great-Britain as aforesaid, and the d *John Eaton* having contracted the said debt *bona fide* with the d *Archibald* and *John Hamilton* aforesaid; and the said *Archibald* d *John Hamilton*, being creditors in that respect as aforesaid, withdrew themselves from the said state and from the United States of America aforesaid, and, they, and each of them did remove and depart out of the said state, (*to wit,*) to Europe, in conformity to the tenor, true intent and meaning of, and in obedience to, the next last mentioned act of the General Assembly, and continually afterwards, from the said twentieth day of October in the said year 1777, until the termination of the said war, the said *Archibald* d *John Hamilton* resided beyond the limits of the said United States, under the sovereignty and jurisdiction of the said king, owing and acknowledging their allegiance to him, and during all the time last aforesaid, they, the said *Archibald* and *John Hamilton*, did not, nor did either of them, return into the said state, to be admitted citizens or a citizen thereof: and the said *Archibald* and *John Hamilton* further say, that true it is, that afterwards, such act of the General Assembly of this state, held at Halifax, on the eighth day of October, in the year 1779 aforesaid, was made as in the same plea in bar, fourthly above pleaded, is alledged. Yet say, the said *Archibald* and *John Hamilton* further say, that by the definitive treaty of peace between the United States of America aforesaid and his Britannic Majesty aforesaid, made and done at Paris, after the said fourth day of July, in the said year 1763, and after the time of making of the said writing obligatory, and after the departure of the said *Archibald* and *John Hamilton*, in conformity and obedience to the act of the General Assembly herebefore pleaded, and after the passing of the said act of the said General Assembly in the same plea in bar pleaded, (*to wit,*) on the first day of September, in the year of our lord 1783, it is (among other things) stipulated and agreed that creditors on either side should meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts theretofore contracted, as by the same treaty, (among other things,) may more fully appear. And the said *Archibald* and *John Hamilton* further in fact say, that they, at the time of the making of the said definitive treaty, and for a long time before then, (*to wit,*) on the said — day of — in the said year 1777, were, and from that same day continually hitherto have been, and still are, creditors of the said *John*

Eaton, by virtue of the writing obligatory in the said declaration mentioned, in manner and form as therein is declared, and on the side of his said Britannic Majesty, within the true intent and meaning of the said definitive treaty, (*that is to say*,) at the state of North Carolina aforesaid, now in the district of North-Carolina, and within the jurisdiction of this court: and that they, the said *Archibald* and *John Hamilton*, at the time of the making of the said definitive treaty, at and before the passing of the said act of the General Assembly in the same plea in bar pleaded, and at and before the departing of the said *Archibald* and *John Hamilton*, in conformity with the act of the General Assembly herein before pleaded, by way of reply, and at and before the time of the making of the said writing obligatory in the said declaration mentioned, and at and before the time of the making of the said act herein before pleaded, by way of reply, and on the said fourth day of July in the said year 1776, and long before, then and from the times of their nativities respectively, were, and from thence continually hitherto have been, and still are, subjects of his said Britannic majesty, owing and acknowledging their allegiance and obedience to him. And that the said debt, in the said declaration mentioned, was contracted, and the said writing obligatory therein also mentioned made and executed by the said *John Eaton*, *bona fide*, before the time of the making of the said definitive treaty, (*to wit*,) on the said — day of — in the said year 1777, and the same debt still remains wholly due and owing from the said *John Eaton* to the said *Archibald* and *John Hamilton*, and hath not, nor hath any part thereof, been paid or satisfied to them, or either of them, *that is to say*, at the state of North-Carolina aforesaid, now in the said district of North-Carolina, and within the jurisdiction of this court. And the said *Archibald* and *John Hamilton* further say that by the constitution ordained and established by the people of the United States for the United States of America, done in convention after the said third day of September, in the said year 1783, (*to wit*,) on the seventeenth day of September in the year of our lord 1787, it is (among other things) expressly declared that all treaties which were then made, or which should be made, under the authority of the United States, should be the supreme law of the land, any thing in the said constitution or laws of any state to the contrary notwithstanding: as by the same constitution more fully appears. And the said *Archibald* and *John Hamilton* further say that, by an act made and provided in a General Assembly of the state of North-Carolina begun and held at *Farmborough*, now in the district of North-Carolina aforesaid, and within the jurisdiction of this court, after the said third day of September, in the said year one thousand seven hundred and eighty three, and after the said seventeenth day of September in the said year 1787, *to wit*, on the eighteenth day of November, in the year of our lord 1787, and in the twelfth year of the independence of the said state, entitled, *an act declaring the treaty of peace between the Uni-*

ed States of America and the king of Great-Britain to be part of the law of the land, it is enacted by the authority of the same General Assembly, that the articles of the definitive treaty between the United States of America and the king of Great-Britain, were thereby declared to be part of the law of the land. And it was also thereby further enacted by the same authority, that the courts of law and equity were thereby declared in all cases and questions cognizable by them, respecting the said treaty, to judge accordingly; as by the same act more fully appears. Wherefore, for that the said *Archibald* and *John Hamilton* were merchants, and were, and are subjects of the said king of Great-Britain, and creditors on his side as aforesaid; and the said debt was *bona fide* contracted before the making of the said definitive treaty, and the ordaining and establishing of the said constitution, and the passing of the said act declaring the said definitive treaty to be part of the law of the land; they, the said *Archibald* and *John Hamilton*, pray judgment and their said debt, together with their damages, occasioned by the detaining of the same, to be adjudged to them, &c.

W. R. DAVIE, *pro Quær.*

DEMURRERS.

I. AND the said *John Eaton* says that the plea aforesaid, by the said *Archibald* and *John Hamilton*, above in replying *first* pleaded, and the matters therein contained are not sufficient in law, to compel the said *John Eaton* to answer to the aforesaid declaration of said *Archibald* and *John Hamilton*, to which the said *John Eaton* has no necessity, nor is he, by the law of the land bound, in any manner to answer: and this he is ready to verify. Wherefore, for default of a sufficient replication of the said *Archibald* and *John Hamilton* in this behalf, the said *John Eaton* as before prays judgment, whether the said *Archibald* and *John Hamilton* ought to have and maintain their said action against him, &c.

II. AND the said *John Eaton* says that the plea aforesaid, by the said *Archibald* and *John Hamilton*, above in replying *secondly* pleaded, &c. as above.

III. AND the said *John Eaton* says that the plea aforesaid, by the said *Archibald* and *John Hamilton*, above in replying *thirdly* pleaded &c. as above.

IV. AND the said *John Eaton* says that the plea aforesaid, by the said *Archibald* and *John Hamilton*, above in replying *fourthly* pleaded &c. as above.

JOHN HAYWOOD, *pro Def.*

JOINDERS IN DEMURRER.

I. AND the said *Archibald* and *John Hamilton* say that the plea aforesaid by them the said *Archibald* and *John Hamilton* in manner and form aforesaid *first* above in replying pleaded, and the matter therein contained, are good and sufficient in law to compel the said *John Eaton* to answer to the declaration of them; the said *Archibald* and *John Hamilton* : which said plea and the matter therein contained the said *Archibald* and *John Hamilton* are ready to verify and prove, as the court &c. And because the said *John Eaton* to the plea doth not answer, nor has hitherto any way denied it, the said *Archibald* and *John Hamilton* pray judgment, &c.

II. AND the said *Archibald* and *John Hamilton* say that the plea aforesaid by them the said *Archibald* and *John Hamilton* in manner and form aforesaid *secondly* above in replying pleaded &c. as above.

III. AND the said *Archibald* and *John Hamilton* say, that the plea aforesaid by them the said *Archibald* and *John Hamilton* in manner and form aforesaid *thirdly* above in reply pleaded, &c. as above.

IV. AND the said *Archibald* and *John Hamilton* say that the plea aforesaid by them the said *Archibald* and *John Hamilton* in manner and form aforesaid *fourthly* above in replying pleaded &c. as above.

W. R. DAVIE, *pro Quer.*

At June term 1796, this cause was argued.

Baker for the demurrer.* I rise to enter into the argument of this important question, with all the diffidence, which the importance of the subject, and the shortness of the time allotted to me for the consideration of it, are naturally calculated to inspire; and my diffidence is increased, when I consider that the investigation necessarily involves in it an enquiry into the constitutional powers and authorities of the late confederation and of our own state government; an enquiry which cannot be other than an important one at any time. Yet, when I take a review of the subject, and deliberately consider the arguments which may be properly offered on both sides, I derive much confidence from a conviction that my client's defence is a substantial one; and flatter myself it will so appear to your Ho-

* *Mr. Att. Gen. Haywood, the defendants' former counsel, while this cause was pending, was promoted to a seat on the bench of the Superior Courts of the State.*

nots, if I can have the happiness to make myself intelligible in the manner I wish.

In examining this question, altho' the right of making the confiscation by our state legislature is not denied by the pleadings : yet with the view to shew the extent of that right, and to give the greater force to arguments which I shall draw from it, I beg the indulgence of this court, while I take a summary view of the doctrine, as explained by the most respectable writers on the laws of nations, and as recognized by the laws of England. I then contend that a sovereign state may rightfully confiscate debts due from its citizens, to the subjects of its enemy.

To prove this I will consider, 1st. the nature of war.

Kattel, page 519, § 138, says, "the business of a just war being to suppress violence and injustice, it gives a right to compel by force him who is deaf to the voice of justice ; it gives a right of doing against the enemy whatever is necessary for weakening him, or disabling him from making any farther resistance in support of his injustice ; and the most proper methods may be chosen, provided they have nothing odious, be not unlawful in themselves, or exploded by the law of nature." If this is the case, it follows of course, I humbly conceive, that a debt may be confiscated : for by that the state deprives the enemy of one great mean of supporting the war against her. The amount of debts due to British subjects in the several states at the commencement of the war with Great-Britain would have made no inconsiderable sum to be carried into the opposite scale ; by depriving the enemy of this, which we do by withholding it from his subjects, we lessen his strength and add to our own : or at least we prevent the diminution of our own very considerably. For how would it have weakened and distressed us to have paid up debts to such a large amount, at that particular time, in specie, (which was the only money that the creditors would receive) which would immediately have been carried out of the country, and we deprived of any benefit arising from the circulation of it among us ? I presume that such a collection, could it have been made would have taken every penny of the specie then in circulation : and it is unnecessary for me to dwell on the inconveniencies and distresses the carrying it out of the country would have put our government to, at that time ; every body knows the difficulties under which we had to struggle for the want of specie ; altho' we were not drained of it as we should have been, had these debts been paid up. By withholding these debts, many whose greatest property consisted in them, might, from motives of interest, remain among us and join in the defence of our liberties ; and the enemy from the cries and importunities of the creditors, who deserted and left their debts unpaid, might be the more readily brought to the sense of justice towards us ; which, the elegant author I have quoted says, we have a right to compel him to, by any just means in our power. If the right to confiscate debts is denied ; what would not be the in-

convenience and injustice of it? We should have to defend the property of our very enemy; for the property of the debtor to the amount of the debt, in fact, belongs to the creditor. It is, at the fund out of which it is to be paid, and upon which it is secured, the debtor protects and insures that fund, against the creditor, contributes nothing to its protection; but, on the contrary, by conduct, makes that protection and insurance more difficult and expensive. In fact, it is against him alone that any exertion for protection is necessary to be made. It cannot be denied but property of every description, other than debts, may be confiscated: and, if so, it is surely just that debts also should be; otherwise one party, whose property in the enemy's country consisted of debts, would have a material advantage over the other, who had property of other kind in the enemy's country, which might and would be confiscated.

Having observed this much, with the view to shew that the right of confiscating debts is a right which every nation may lawfully exercise against its enemy, on the breaking out of a war, in conformity to those general rules before mentioned from *Vattel*: I will now trouble the court with a few cases, to prove more particularly that debts may be confiscated.

Vattel, p. 484, § 77, says, "among the things belonging to the enemy are likewise incorporeal things; and all his rights, titles and debts, excepting however those kind of rights granted by a third person, and in which he is so far concerned that it is not a matter of indifference to him by whom they are possessed. Such, for instance, are the rights of commerce. But, as debts are not of this number, war gives us the same right over any sum of money due by neutral nations to our enemy, as it can give over his other goods." The same doctrine is laid down 3d. *Gratus* 143, and goes to shew beyond question that, by the law of nations, a debt may be confiscated as well as any thing else; even if that debt is due by a neutral nation to the enemy. And if so, much more ought it to be the case, when due by one of our own citizens, who is in our own country, and himself and property subject to no other power but the laws of our own government.

This right of confiscating debts is recognized by the law of England, which must also be the law here. *Parker's reports of Exchequer cases*. 27. "*Attorney-General vs. Weeden and Shales*. In this case, upon long debate, it was resolved 1. That choses in action, which belonged to an alien enemy, were forfeitable to the crown, *Maynard's Edward 2d, inter memorand. scaccar.* 41.
"2. That this ought to be found by inquisition to make a title to the king, and that this was an inquisition of entitling and not of instruction. *Page's case*, 5, Co. 52.

"3. That the peace, being concluded before the inquisition was taken, discharged the cause of forfeiture.

"4. That the inquisition, taken afterwards, did not relate to

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* set up their forfeiture; for the cause was but temporary, and that "cause being removed before the king's title was found, the finding after should not relate." Here the doctrine, contended for by the defendant, is fully established; for it shews the right to make confiscations, although it was considered not to have been made in this case: because the requisites were not performed until the peace; when the right ceased. But, in our own case, I apprehend every necessary requisite was performed. The act of Assembly naming the party, and what property should be confiscated, of itself was equal to an inquest of entitling—and any further inquest, that might possibly be necessary for any purpose, in the case, could not be considered in any other light, than that of an inquest of instruction; which could not affect the right, and is only had for the purpose of assisting the officers of the revenue. This was answered in our case, by the commissioners, who were appointed by the act, to collect the debts &c. especially, as the debt was actually paid into the hands of those commissioners.

In the courts of law of England, it is a good bar of the plaintiff's action, to plead that he is an alien enemy. 1 *Hale*, 95; 1 *Bacon's abridgt.* 84, 85, *Cro. Elix.* 182. And every bar is perpetual, 6 *Rep.* 7, *Ferrar's case*, *ib.* 46. *Higgins' case*.

This also shews that a debt may be confiscated; for if this is a good bar to the action and that bar is perpetual, it must be on the principle, that it is unlawful for the defendant to pay the debt to one who is an enemy, and who will use it to the injury of the state, whose subject he is; but it surely does not discharge the debtor, for that would operate as a benefit to the individual, and not to the community at large; for which there is no reason, and therefore the debt must belong to the state, which is placed in the shoes of the original creditor, and then he is properly barred from a recovery.

This right of a sovereign state is not usually exercised in England; because their *Magna Charta* provides in another manner for them. That is by putting them in sequestration, until it should be known how their merchants are treated in the enemy's country, and that if they were well treated, these should be so too. This *Magna Charta* is a kind of constitutional act, and therefore cannot be considered to extend in its operation to this country, as we have a written constitution of our own; and we have not thought proper to introduce such a principle as this into the constitution, it follows that the sense of the people was against it.

But, this right of a sovereign state is recognized by the present judges of England. *H. Black. Rep.* 135, 149, 3, *Term Rep.* 731.

This is a regulation calculated to suit a mercantile country like that of Great-Britain; being instituted for the convenience and protection of their merchants, and the support of their trade; that trade from which they themselves derive such national support, and without which their fame as a nation, would not perhaps, even at this day, have far extended beyond the limits of their own little island.

Even this regulation proves, that the right I contend for may be exercised, if the government think proper, and that it did exist before *Magna Charta*. If so, it must now exist here. This regulation is not used in England now, because by treaties with the European powers, the merchants on the breaking out of a war are allowed a certain number of days to withdraw themselves and their effects, &c. *Sullivan's Lectures*, 527. But no such treaties are opposed to the right in our case; and in our case the right remains therefore as it was originally, cleared of all objections of this sort. If it is said to be unjust, and that it affects the sacred obligation of contracts, I answer that there is no more injustice in the state seizing on one kind of property than another. In either case, the person whose property is seized, has an equal claim on his own sovereign for compensation for his loss: and as to its affecting private contracts, the creditor having by his own conduct put himself out of the protection of the law which made the legal obligation of the contract, he is no more deprived of his right in the case of a debt, than in the case of any other property, which is taken from him. For in either case, he is disabled to sue for redress; and if the law did not provide in some manner for the case of the debtor, he would be the sufferer instead of the creditor; as there would be no one to whom he could lawfully pay his debt: and it is just and right that he should be authorized, by some competent authority, to discharge his contract when it became due; as the right to pay it to the original creditor is taken away. This mode of affecting the right to choses in action, by acts of the legislature, is frequently exercised in England.

1. It is done by acts of attainder, 4, *Bac. Abr.* 214.
2. It is also done on conviction for treason or felony. 2, *Bac. Abr.* 577.
3. Also by outlawry, 3, *Bac. Abr.* 754, 4, *Id.* 214.
4. By bankruptcy, by force of the acts, although the debt be due in a foreign country, 4, *Term Rep.* 182, *H. Blackst. Rep.* 134, *in notis.*

5. It was also done, *ipso facto*, by the south sea act; which vested the whole estate of the directors, in the hands of commissioners for the payment of their debts. 1 *P. Williams*, 895.

In these cases of forfeiture the debt is so completely vested, that the assignee of the king may sue in his own name. 4, *Bacon*, 214.

Having now established unquestionably, as I humbly conceive, the right of the state to confiscate the debt: I will proceed to shew, in the next place, that they have made such confiscation, fully and absolutely. But the only parts of the confiscation acts, which I shall beg the attention of the court to, at present, are the 2d section of the act of 1779, entitled, "*an act to carry into effect, a former confiscation act, &c.*" in which it is enacted, "that all the lands, tenements, and personal property, within the state, of a number of persons by name and among the rest the present plaintiffs and of all others, who come within the meaning of the confiscation

and this act, and all and every the right, title and interest, which
 'all or each of, the said persons may have had therein, on the 4th
 'day of July, 1776, or at any time since, shall be, and hereby are
 'declared to be confiscated, fully and absolutely forfeited to this
 'state : and shall be vested in the hands of commissioners, as in
 'this act directed, to be appointed for the purpose herein after
 'mentioned :'' and the 3d section of the same act which among other
 things, says "the commissioners shall have full power and authori-
 'to take possession of all lands, tenements, hereditaments, monies,
 'debts, whether due by judgment, bond, bill, note, or otherwise,
 'and all other personal property of the persons aforesaid, in the
 'name and for the use of the state ; and shall give receipts and dis-
 'charges, which shall forever indemnify and acquit the persons de-
 'livering or paying the same, their heirs, executors and adminis-
 'trators, against any future claim, for the article or money men-
 'tioned in such receipt and discharge." This act is sufficiently full
 and explicit to vest the property of this debt in the state : and I feel
 satisfied that I have now established both the right to make the con-
 fiscation, and the legal exercise of that right, in the manner set forth
 in the defendant's pleas. Here, I might rest the case until the coun-
 sel for the plaintiff should shew some legal ground, upon which this
 debt, which was thus legally divested, has become since re-vest-
 ed in his client : so as to entitle him to recover, notwithstanding
 this act. But in this case, the debt was actually received by the
 state, and thereby became extinct, as between the original creditor
 and debtor. To prove this, it is only necessary, I conceive, to
 state again what I have already proved, that is that the state had
 the right of confiscation, and that they exercised that right. For
 then it follows necessarily, that the state, having taken the creditor's
 right to herself, has lawfully a right to receive the debt of the debt-
 or ; and therefore, the debt was lawfully paid. And, if once law-
 fully paid, it is surely entirely discharged as much as it could be, in
 case of a payment to the creditor himself, or any assignee of his, or
 any other person lawfully authorized to receive ; whether under au-
 thority from him, or any other competent authority ; the contract
 was entirely at an end, there being after this payment, neither
 debt, debtor, nor creditor. This appears to me, to be such a ne-
 cessary and clear conclusion that it would not need the aid of autho-
 rity. I shall therefore adduce only one, in support of it, and that
 is *Bynk. 2, J. P. L. 1. c. 7.* who says : " what I have said of things
 'in action, being rightly confiscated holds thus, if the prince really
 'exact from his subjects, what they owed to our enemies. If he
 'shall have exacted it, it is rightfully paid. If he shall not
 'have exacted it ; peace being made, the former right of the cre-
 'ditor revives accordingly. It is for the most part agreed among na-
 'tions, that things in action being confiscated in war, the peace be-
 'ing made, those which are paid are deemed to have perished, and

remain extinct. But those not paid revive, and are restored 'their true creditors.' After having shewn the confiscation & discharge of the debt, in this manner, I shall proceed to consider the operation of the 4th article of the treaty of peace, relied on the replication, as a repeal of the confiscation acts.

1. This 4th article may be considered as standing alone, and connected with any other article of the treaty.

2. As connected with the two following clauses.

As standing alone, whether it be a repeal of the act of 1779 or depends upon what ought to be considered the meaning of the word *creditors*; which is of doubtful signification as used in this place. It may mean those who were creditors at the time of the treaty, the debts not being transferred from them by confiscation to the state, and then remaining unpaid: or it may mean those who had been creditors and were then unpaid, although their debts might have been transferred to the state by confiscation.

To give to this clause the meaning first mentioned, will entitle creditors of the first class only to recover. But to give it the other, those of each class, and of course, the present plaintiffs, will be entitled to recover; if the payment to the state does not alter the case, which it undoubtedly does: for surely it is not reconcileable to our understandings, to call those *creditors* whose debts have been once legally discharged. Which of those two meanings is to prevail, must depend upon the true rules of sound construction.

1. I conceive then, that the state, having lawfully acquired those debts by a clear title, is entitled to retain that acquisition, until as clear a relinquishment be shewn. *Vattel*, 645, § 21.

2. Where a treaty will admit of two different constructions, that which changes the present state of things is to be rejected; and that in favour of the possession to be received; this is the clear opinion of *Vattel*, 399, § 305.

If the present plaintiffs can recover, under the authority of the treaty, the state of things in our country is changed in this respect. At least the money which the plaintiffs seek a recovery of, was legally and absolutely in our possession; as much so, as property of this kind could be in any case. The very money was in our treasury; and, if they are now to recover it of the defendant, it must be taken out again to reimburse him. If this is not changing the state of things as they existed at the time of the treaty, I confess I am ignorant of what would.

3. In cases of doubt, the construction ought to be against the proposer of the article. *Vattel*, 651, § 32. *Gro. c.* 20, § 26. This is a clause inserted, beyond doubt, at the instance and for the benefit of the other party; it is not reasonable to suppose, that we should voluntarily propose such a one, which is thus calculated to confer such a benefit on them at our expence. If it was incumbent on them to express themselves more explicitly, and they have not done so, it is their own fault and not ours. Is it fair or just to ex-

and this construction the length contended for, to the advantage of the proposer of the article, when it will lead to such absurdities, and when if that had been the real intention of the parties, they might and ought to have expressed themselves, in such a manner as to have left no room for doubt? How easy would it have been, to have said that these recoveries should be effected, in all cases of a debt due at the commencement of the war, notwithstanding the confiscation laws, &c. That would have put the business, so far as it regarded the intention, at least beyond doubt. Surely, if their meaning had been what is contended for, the words I have mentioned, or some other more fully to express that meaning, would have been used. But our commissioners never would have acceded to such an article: they knew too well the limits of their authority, to agree to any thing of the kind; as will plainly be seen when the following clauses of the treaty are considered. I say our commissioners had no authority to enter into a treaty that would have the extensive operation which it is pretended this 4th article ought to have. Some of the states could not pass retrospective laws; and of course congress, their deputies or delegates, could not do any act which would have such an operation on rights legally acquired, under the laws of any state; nor could a majority of the states exercise such a right. How then, could congress, which is a representation of the states and for a particular limited purpose? Congress had the right to make treaties for the United States beyond doubt. But those treaties were to operate as compacts, and the faith of the several states stood pledged for the performance of them; so far as congress acted with good faith and within the limits assigned to them by the spirit of the confederation. If they, by their treaties, interfered with the internal police of a particular state: as they were only chosen to manage the general concerns of the union, and not of a particular state, that state was not bound until she passed an act to adopt the treaty as a part of her laws; congress, knowing this, would not stipulate positively to do any thing which should interfere with the laws of any state; but in such cases would only agree to recommend to the several states what they wished done; which in most cases would have the same effect. But it would not in all; nor could it in any, without the consent of the states explicitly given, by passing laws in conformity to it. This it will be seen is the part congress or their commissioners did act with regard to this very business, in that part of the 5th article of the treaty, which is recommendatory. And this leads me to consider this 4th article,

2. As connected with the two subsequent articles, the 5th and 6th.

This appears to me to be the true way to consider it: and this will be the more necessary, when we consider the short, vague terms of this 4th article: and give to the other two, the construction that is reasonable when compared with the 4th. By a different mode of construction one article might militate directly against another; and it would be impossible to account for the true meaning of every part of

the treaty satisfactorily. The propriety of this mode of construction is self-evident, that I shall produce but a single authority to support it. *Fattel* 323, § 285, "we ought to consider the whole discourse together; in order perfectly to conceive the sense of it, and to give to each expression not so much the signification it may receive in itself, as that which it ought to have from the thread and spirit of the discourse."

Viewing these three articles together then, as they all relate to one general subject, it is plain that they import a full confirmation of all our confiscation laws. It is not stipulated that one of them should be repealed or impaired in the least, only so far as the recommendation might have such an effect. How is it then that a debt legally confiscated and vested in the state by an actual payment into the treasury, can be considered as given up, or the act of 1779 repealed?

If the 4th article is considered to stand alone, then such a construction as is contended for, would appear more reasonable: but why should we resort to this article alone, to be informed of the intention of the contracting parties? Were the other two inserted for no purpose? They, in my opinion, fully explain the 4th; because they shew that it was not the intention of our commissioners to do any thing which should repeal an act of the legislature of any state, and that they only intended to give a right to recover such debts as were then due and unpaid; not being claimed by any state as her property, which would take in the debts in most of the states (for few of them I believe actually confiscated those debts, altho' most of them passed laws for their sequestration) which not affecting the original creditor's right absolutely, would of course be properly the subject of a treaty, and come under the operation of this 4th article. If this was not what our commissioners intended, why do they stipulate for recommendation to the several state legislatures for repeal of the confiscation laws? why do they require congress earnestly to recommend to the state legislatures to provide for restitution &c? why do they agree that other persons than those particularly described, should have leave to go to any part of the United States, to remain twelve months unmolested, in their endeavours to recover their estates, rights and properties? why was it necessary to stipulate that this class of persons should pay the *bona fide* price, for which their property sold, on the same being delivered up by the legislature? and why was it necessary to state in the 6th article, that there should be no further confiscation, and no further loss &c. ? If the confiscation laws were repealed; there could not be any further loss, and in fact there had been none, as the creditor was to recover the full value of his debt, and if the commissioners had a right to repeal a law of the state, why have they not done so positively in the cases where they have agreed to recommend only? for they have in that case equally shewn their willingness to restore the property as in the case of the debts: but so far from that, where any part of the contract of our commissioners, was likely to affect exist-

laws of any of the states, they have only stipulated that congress should recommend a repeal of those laws so far as to make them conformable to such agreement : which is all they have done or had right to do. Our commissioners knew that it would not do to further than this, if they had the right even. The states never would have consented to such a thing in the then situation of their affairs, and the people would have revolted at the very mention of anything so shocking to their feelings, at that particular period, when sufferings and miseries of the war were fresh in their minds. If other than real British subjects were intended to be benefitted by 4th article, it could only mean that no further impediments than those already created by the acts of the legislatures, should be imposed. If this is not what was intended, and on the contrary, they intended by these general words, to repeal every law of the states, which raised such an impediment, they must surely have acted on the supposition that they were clothed with authority to effect such a repeal, or they were not acting with good faith, and if it was the case, how can we account for their stipulating to recommend only in every case, where a repeal is mentioned ? If they had a right to repeal our laws in one case, so they had in another : but there was as much reason for their doing it in one case as in the other ; if we suppose a complete restitution was desired and intended far as they were enabled to make it. If this idea, that our laws are confirmed by the treaty itself, the commissioners having gone on the principle of their not possessing authority to effect a repeal of them absolutely, is not made already sufficiently plain and evident, her proofs of it are not wanting.

1. The commissioner, on the part of Great-Britain, himself, so understood it : he attempted to get something more done for this class of people ; but our commissioners, for the reasons already mentioned, refused to go any greater lengths to favor them. As a proof of this, I beg leave to refer to the correspondence on the subject between the commissioners on both sides, as it is stated by Mr. Jefferson, when secretary of state, in his correspondence with Mr. Hammond, the British minister, p. 71, No. 8, 9, 73, 10, 76, 11.

2. It was also so understood by the ministry and members of parliament in Great-Britain, in the year 1783, when the preliminary articles were under consideration. *Ibid* 32, 33.

And these proofs are of such a nature as to carry entire conviction on my mind. Can any reasonable man suppose that our commissioners intended by this 4th article, to repeal every law of the states which confiscated these debts, when they all join in declaring that they have no right to repeal any one of those laws, because congress, from whom they derived their authority, had no such right ? and when the British commissioner, on that declaration being persisted in, at length, agreed to accept such terms and such alone, with respect to the refugees, as our commissioners professed they had a right to agree to ; and when the British ministry and the Parliament, who,

we must suppose, would judge full favourably for themselves, declared they were satisfied that our commissioners had gone the length of their authority, and did not pretend to require any thing more of us, with respect to confiscations, than what the recommendations would probably effect. It is clear then they treated with on this principle : and if we act up to that; altho' possibly these commissioners might have possessed greater powers than they thought and declared they did, yet we are surely not bound to extend the contract farther than it was originally intended by the parties on both sides, when acting on this principle, thus fairly declared and understood at the time. But the true meaning of this 4th article, I humbly conceive, this : those who were real British subjects, residing in Great-Britain when the war commenced, should meet with no legal impediment to the recovery of their just debts &c. that such debts as then existed, not forfeited and vested in the state by any act of the legislature, although the right to recover them had been taken away during the war, by the creditors becoming an enemy, or by some positive statute, disabling him to sue, or sequestering his property : nor were they to be impeded in their recoveries, by the operation of tender or pine barren laws, or paid off with depreciated paper money, at its nominal value. These were the impediments that opposed themselves to the recovery, and these it was necessary to remove, and in the manner they have been removed by this 4th article, in order to give that full recovery which was had in view, and in fact it is nothing more than saying, we will be friends; hostilities shall cease ; and courts of justice shall be opened for all just recoveries on both sides. And although this might seem unnecessary in some degree, yet it is usual in such treaties, and serves to ascertain to the creditor beyond doubt, the right to sue on the return of peace : which right, it is necessary, should be declared by some public act of the government, before it could be noticed in the courts of law, although it should be otherwise ever so well known. But nothing of all this goes to shew what shall be recovered ; that, I apprehend would have been expressed in stronger and more explicit terms, had it been the intention of the parties to regulate it in this clause. That was an office left however, for the 5th article to perform, which says, with regard to persons of the description of the present plaintiffs, for they cannot be considered real British subjects. I conceive, that they shall have leave to remain among us twelve months, endeavouring to recover their estates, rights and properties under the recommendation of congress. These words of themselves are so full and expressive, as to take in debts and every other species of property, to which they might set up a claim : and if they are doubly provided for in the case of debts, if they are all to be included in the 4th article. But this cannot be the case, for why was it necessary to make any distinction at all, if every description of subjects were equally alike to be benefitted ? To construe the treaty in such a manner, as to work a repeal of the act of assembly

would be derogatory to the independence of the state, and productive of injustice and oppression. On the other hand, to preserve the independence of the state, and say that the treaty does not repeal any of her acts, and yet a very numerous class of creditors will be provided for; in the 4th article, which thus removes the impediment to the recovery of those debts, which had never actually been confiscated. To construe the treaty as is contended on the other side, those who have paid must pay again; for in this sense of the word *creditors*, as much as any other persons, the plaintiffs must be creditors.

But every treaty ought to be according to the fundamental laws and constitution of the country for which it is made.

Pattel, 352, § 228, "thus also an oath cannot render a treaty valid that is not so; justify a treaty that is unjust in itself; nor lay an obligation to fulfil a treaty lawfully concluded, when a case is presented where its observation would be unlawful. As for instance, if the ally, to whom succours have been promised, undertakes a war that is manifestly unjust. In short, every treaty prejudicial to the state; every treaty made for a dishonest cause, or contrary to the fundamental laws, being null in its own nature; the oath that may have been added to such a treaty, is also null, and falls with the act it was intended to strengthen." The same doctrine is laid down in *p.* 192, § 265, *p.* 296, § 154, *p.* 297, § 156.

And in *p.* 637, part of § 10, this author says, "when a limited power is authorized to make peace, as he cannot of himself grant every condition, in order to treat on sure grounds with him, it must be required that the treaty of peace be approved by the nation or power, which can make good the conditions. As for instance, in treating of a peace with Sweden, if a defensive alliance and a guarantee be required for the condition, this stipulation will be of no effect unless approved and accepted by the diet; which alone has the power of imparting validity to it. The kings of England conclude treaties of peace and alliance, but by these treaties they cannot alienate any of the possessions of the crown, without the consent of parliament, neither can they, without the concurrence of the same body, raise any money in the kingdom. Therefore, when they negotiate any treaty of subsidies, it is their constant rule to communicate the treaty to parliament, that they may be certain of its concurrence, to make good such agreement."

If therefore of two constructions, the one be against the fundamental law, and the other consistent with it; that which is repugnant to the fundamental law, must be abandoned, and the other received; otherwise the treaty itself must be abandoned. And the construction contended for here, seems to be against our constitution.

1. The General Assembly have no power, but what is given to them by the people, declared in the constitution. In limiting this power, they have said, "that no man shall be deprived of his property, but by the law of the land." *Bill of Rights*, § 22.

1. From the nature of a *debt*, being a thing which is obligatory only by the explicit contract of the individual to whom, you cannot say that a *debt* is a *debt* and pay for it who is not a *debt*.

2. By the law of nature, the *legislature* is under an obligation to perform what it has promised; and the *people* have a right to that performance; therefore it is a right to demand what it has engaged to support. And we have already said it has engaged to support the *payment*, here promised as a fulfillment of the debt. Can the *legislature* now, after it is entrusted upon its own principle, pass a law to annul and nullify the obligation of its promise, upon the plea of a debt which has parted with his money? That it has no such right at the present, and the impropriety of exercising it, will appear, stating to your Honours, the numberless instances of the most oppressive and harshness, that it would be productive of; but I leave it to be too plain to admit of doubt, and therefore I shall not be so granted, that such a right does not exist in the *legislature*, and it is much less than it is in congress or their commissioners. Can you then to a more executive body; possessing no other power, but that as now generally exercised by the executive branch of a government. This is the light in which the *commissioners* viewed it, and I have before shewn: this is the light in which the *British* government viewed it, as I have also before shewn: and it is further manifested by their long detention of the *Western* *Prizes*, because those acts of *Albion*, which opposed the operation of the 6th article of the *treaty*, were not repealed. This is the light in which *congress* naturally viewed it, when they required of the *States*, at different periods, to repeal those laws which opposed the treaty. And this is the light, in which I conceive every candid mind must view it, when he deliberately examines and considers the articles of the *constitution*. As to the 6th article of the *constitution* of the *United* *States*, it surely never intended to give greater efficacy to the *treaty*, than it had before. What reason was there, for making it more binding on the *States* under the new government, than it was under the old? We had received no new consideration from the *other* *party*, for such an extension of the obligation on our part. Could it have been supposed at the time the *constitution* was adopted, that it would have this operation; that single article would have raised from every quarter the most insurmountable obstacles to its adoption: the fact is, this article was inserted as one of means, to put the *treaties* that had been made under the old government in *force*. For without such an article, it would have been very questionable, how far those *treaties* would be binding upon us under the new government. And as to the act of *Albion*, making the *treaty* the law of the land; I have already mentioned, that this act was passed in conformity to a resolution of *congress*, to afford a proper pretext for demanding

Under of the Western Posts, which were withheld on the pretence that the treaty had not become the law of the land; not having been ratified by the several state legislatures, but that it by no means was intended to extend the length contended for, by the plaintiffs. Had that been the intention of the legislature, can it be supposed but that something more would have been expressed in the treaty as to that part of the treaty, at least, which is recommendatory: it would have been necessary, I humbly conceive, to have made a law entirely different from that which passed, both as to the title and substance of it; and this the journals of that Assembly in 1763 was attempted, (not that I know or believe that it was the work of a single member) but it does appear that the first bill introduced on the subject, was entitled, "a bill to repeal such laws as are in violation against the treaty of peace made with Great-Britain," &c. p. 17 of the Senate Journals, and 9 and 17 of the Commons. This bill was dropped after one or two readings, and the other was afterwards brought in and passed; which sufficiently shews the intention of the Assembly, and which has been further manifested, at various times since, by their proceeding further to carry the confiscation into effect, and to bring suits under them; one of which is now depending in *Newbern* superior court. But, in fact this act could not be a repeal of the confiscation laws only in such cases where the treaty contains an absolute stipulation; and that I have attempted to shew, was not intended in the case of the present plaintiffs; as to them, it was only recommendatory; and I rest satisfied, that this act making the treaty the law of the land, has done nothing for them. But suppose it should be considered as a repeal, it cannot be extended to the re-obligation of the defendant. For 1. A subsequent law repugnant to the former, cannot be so construed as to do away a right lawfully acquired under the former law. In proof of this, I shall read 2 *Bacon*, 75, the substance of a case reported in 2 *Mod.* 310, determined upon the statute of frauds and injuries in England, 'that the clause which enacts that no action shall be brought, &c. to charge an executor, &c. extends not to promises made before, tho' to be performed after, the making of the statute; for it would be against natural justice, that a promise made upon good consideration, should be destroyed by the retrospect of a law, which none could divine would be made.'

2. It has been always held that every thing which was done under a law whilst it was in force, was valid altho' the law should be afterwards repealed, 4 *Bacon*, 638. 'If a statute be repealed, all acts done under it, whilst it was in force, are good.' *Jenk. Cent.* 33. *Pl.* 6. Then, here is at once an insurmountable objection to the plaintiffs' recovery. It is admitted that the state had the right to confiscate and direct the payment of the debt into the treasury, and the money is paid in accordingly, before the repeal takes place; this payment then was something done under the law of confiscation,

whilst it was in force, and is valid agreeably to the principle which I have established; therefore the repeal cannot affect it.

3. If the statute of repeal is against common right and reason, is void. 4 *Bacon*, 635. 8 *Rep.* 118. This repeal, if it is one in reality, is surely against common right and reason. When the defendant paid his money to the state, it was in consequence of the legislature declaring to him that he should be discharged from paying a gain to the plaintiffs; and relying on that, he makes the payment and has a right to the discharge; for it is admitted that the legislature was competent to pass a law of this kind, transferring the right to receive the debt to the state, and if so, the payment was as good as if it had been made to the plaintiffs themselves; and it would be equally unjust to make the defendant pay it again. If he is compelled to do so, it may much distress him now, when the sum is very considerably increased by the accumulation of interest and costs. I therefore do conceive, that on this principle also the plaintiffs ought to be barred of a recovery; and upon these grounds, as I have occupied so much of the time of the court, I will submit my client's case to the consideration of your Honours: as to you any recapitulation of them might appear to be more tedious than necessary.

Davie, contra. IT is acknowledged that the bond in question represents a debt *bona fide* contracted before the ratification of the treaty of peace; that the defendant is a citizen of the United States; and that the plaintiffs are subjects of the king of Great-Britain.

The obligation of contracts is not only founded on moral principles, but that necessity of individual confidence, so essential to the well being of man, and indispensable to the existence of human society. Thus, one of the first objects of government in every country has been to establish some civil or judicial mode of deciding controversies, and enforcing the performance of contracts. So that, between individuals of the same community, the moral obligation is scarcely distinguishable from the legal obligation; and the collected power of the society immediately follows to enforce it.

By the law of nations, contracts between individuals of different communities shall meet with no legal impediment to their execution in time of peace, and shall have the benefit of the constituted authorities of those communities to enforce them; and it is considered at present, as a maxim uncontroverted, that a war of itself does not extinguish the rights, or dissolve the obligations, which existed before the commencement of it, between members of the different belligerent societies; although, during the continuance of the war, the rights of bringing suit is suspended. Thus, if this case stood upon the common or general ground, there would certainly be no objection to the recovery of the plaintiffs, raised upon the relation of the parties, or the intervention of a war.

But, to this action the defendant has pleaded four several pleas in bar, grounded upon the confiscation laws of this state.

A payment to the commissioners, under the act of October 9, with their receipt and discharge.

The act of November 1777, and the two first sections of the act of Assembly of 1779; alledging that thereby the debt was contracted, and absolutely forfeited to the state of North-Carolina.

The third plea rests on the fourteenth section of the act of October 1779; alledging that the plaintiffs refused to take the oath of alliance, and were compelled to leave the state by virtue of the acts of 7; and that they had not appointed any lawful attorneys or agents to receive and give discharges for debts; that therefore, &c.

The fourth plea is in substance the same with the second, though in different form.

To these pleas the plaintiffs have replied, the act of Assembly of 1777; averring that they were then, and had been from their respective nativities, subjects of the king of Great-Britain, and that they were at that time merchants within the meaning of said act, that they departed out of the state, in conformity to the said act of Assembly. To this is also added the fourth article of the treaty of 1783, saying that they were creditors on the side of his British Majesty; and therefore &c.

Although the case made in the pleadings appears to be generally that of an open and solemn war between two independent nations;

I admit that the following important facts also appear, and that these must be had to them as the key of explanation to the confiscation laws, viz. that the colonies, now United States, were formerly a part of the British Empire. That they, being disgusted with the British government, remonstrated to the common sovereign on the subject of the British Parliament; that their injuries remained unredressed, and Great-Britain proceeded to enforce her usurpations by arms; and these measures produced defensive operations on the part of America, until the fourth of July 1776, when congress thought proper to declare the colonies free and independent states. This act produced a new order of things. The states immediately proceeded to form constitutions, and afterwards to enact laws. The commercial and political dependence of the colonies upon Great-Britain, as the mother country, had connected the interests of numbers with the old government; these of course had determined to remain attached to it, and the fourth of July became the epoch of discrimination. These people had interest, by which they might naturally be induced, so they had rights which were not to be violated. There would be no question on principle, as to the right of remaining under the old government; the great question was the right of change. It was the state of things, when North-Carolina began to legislate on the subject of confiscation.

The whole case may be safely considered as reduced to two general heads.

1. Whether the debt in question, is within the purview and operation of the confiscation laws?

2. If this debt is within the operation of those laws, what the pleas of the defendant are among the *impediments removed* by treaty of peace?

In order to form a satisfactory judgment on the first point, it will be necessary to take a general view of the system of the confiscation laws; that their policy and relation may be properly understood so that, when those pleas come to be considered on detached parts of the acts, we may be furnished with some rule of construction, which being formed from the whole law, will equally apply to all its parts. I shall pursue this part of the enquiry with a pleasure derived, not only from the discharge of my duty as a lawyer, but from the hope that I shall be able to shew, that even amidst the conflict of political opinions, and the violence of a revolutionary war, the legislature of this country acted with dignified moderation, and an inviolable attachment to the principles of natural justice.

The first legislative act on this subject, passed April 1777*, the 5th, 6th, 7th, 8th sections respect the present question, (*they were read.*) The parts of the act arose out of the peculiar circumstances of this country, and were dictated by the wisest policy, and are perfectly conformable to the principles of natural law. The writer on this subject says†, that a nation has a right to form, and to perfect its constitution; that it may reform its government, and even change its constitution; but the rights of the dissenting citizens are reserved to them, "viz. to retire elsewhere, to sell their lands, and take with them their effects."

1. The court will observe that by the act of Assembly, persons of the description of the plaintiffs have their election to remain as members of the new state; or retire into the bosom of the old government.

2. They may dispose of their estates.

3. They may export the amount of it in produce.

4. They may appoint attorneys to sell, after their departure, &c.

These form the outlines of the terms of the separation; and may be considered as a full expression of the mind of the sovereign power; but neither the debts created before, nor even by those sales are within the purview of the act.

The debts are not mentioned; much less are they required to collect them before their departure, &c.

All compulsory collection was impracticable. No courts existed to enforce the demand of the creditor, &c.

The legislature met again the same year, and in November, passed another act,‡ nearly to the same effect.

The clauses remarked upon in the act of April 1777, are re-enacted *in toto* with the addition of section 9th, imposing certain disabilities on persons suffered to remain in the state; and enacting a new discrimination between those who departed within the time allowed, and those who remained after that time: the latter could

* 1, 1777, 3, 284. † Vattel, 30. ‡ 2, 1777, 6, 324.

not depart without leave of the executive, under the severe penalty of confiscation. The penalty was not inflicted for *departure*, but *departure without permission*.

The 7th and 10th sections, repeal the penalties for returning.

The proviso of the 6th section, is again a solemn recognition of the law of nations, and the immutable principles of justice.

Here the same remarks recur, which have been already made on the same sections in the act of April 1777; and let it be noted, that the right to sell is expressly to the parties, and their attorneys after their departure, that this admits a subsisting debt, either due by the vendee or the agent. That old or previous debts are not mentioned, that the attorneys are neither authorized nor required to collect the debts; that as the debts are neither mentioned nor contemplated; no time was fixed for their collection.

It was before mentioned, no courts existed. Courts were now erected, but those persons and their agents were excluded from the benefit of those courts, as will appear by the 101st. of the court law.† The next act,‡ in order, on this subject, was passed the same session, this act has been emphatically stiled in subsequent acts, "the confiscation act," it is indeed the basis of all the subsequent confiscation laws. (*Here the law was read.*)

It may be remarked, that the descriptions contained in the preamble, do not include the case of those *compelled to remove under the laws of the state*. The expressions, "withdrawn to attach," "withdrawn to avoid, &c.," "beyond the bounds, at the beginning, &c." are not intended to include them.

The reasons stated in the latter part of the preamble, shew clearly that those persons were not contemplated.

The enacting clause, § 2, makes a like distinction between withdrawing voluntarily, and a compulsory departure, *that is to say*, the case of merchants expressly called upon, and that of a common citizen or subject, independent of the several cases expressly made; which are those of a voluntary withdrawing or absence; the provisory clause of the same section, requiring them to appear at the next Assembly, *proves* beyond dispute, the meaning and extent of the law. Not availing themselves of this means of restoration, was to be the ground and criterion of confiscation.

This shews the whole aspect of the act, and limits the sphere of its operation.

The fourth section makes them and their case an express exception to the act. This act was not necessary, to complete both justice and policy, with regard to them: all real estates unfold after three months, was to be considered as confiscated and forfeited to the state. The debts as I have *shewn*, were not contemplated.

This act evidently intended to include all those cases which had not been *acted upon* by former and existing statutes.

While this act forms the basis, it also furnishes a rule of explanation—
 ‡2, 1777, 2, 101, 318. ‡2, 1777, 17, 341.

tion to all the subsequent acts, as will appear, not only by the established rules of construction, but the plain tenor of those laws.

The next act,* which operated upon confiscated property, by being acted upon, passed in October 1779, and is the act alluded to in the second and third pleas of the defendant. The court will observe, on the reading of this act, that it has proceeded on the acts of April 1777, and the act of November 1777, chapter 17, clearly distinguishing the two cases I have stated to the court. (*Here the 2d, and 3d sections were read.*)

The fourteenth section is intended to operate on the case of the persons who separated from the new community, under the acts of April 1777. (*Here the law was read.*)

The preamble shows the purview and intended operation of the 2d and 3d sections, clearly limiting them to the objects of the act, chapter 17, November 1777.

It is a rule of law that all acts or statutes, relating to the same subject, are to be construed as one act, and a consistent construction, if possible, given to every part of them. Thus the whole confiscation laws must be considered as one legislative act, making one consistent system.

The construction authorized by this rule, and the only consistent construction that can be given to this part of the act, I take to be this: that the real estates of those persons therein named, who had been compelled to leave the state, under the acts of 1777, and which they had neglected to sell, should be sold with those confiscated, under the act of November; and that their being named here, should operate as an office found, as to those lands formerly owned by these persons,

It does not include their debts, because the state had required them to sell and depart.

It could not proceed on their adherence to the old government, because they had made it high reason to return to the new state.

Thus, a compliance with the act of November was impossible—and the case of debts, it will be observed, is intended to be provided for in the fourteenth section.

The real estates unfold were already confiscated; something in the nature of an office was all that remained necessary.

It follows then, by fair and legal inference, that where the word occur, it must be supposed to refer to persons under different descriptions, of which there were many named in the act.

The fourteenth section† has taken for its basis, the provisions of the expulsion acts, as they are usually called of 1777: and assigns, two causes of confiscation, as requisitions of the former act, viz.

1. Not disposing of their real estates.
2. Not appointing any attornies to collect their debts, &c.

The first is perfectly consistent with the provisions in both acts of Assembly.

The other is evidently founded on mistake. The act gives them leave to appoint attorneys to sell and dispose of their estates, but not a word is said about receiving and giving discharges for debts—the following, or latter part of the provisional clauses, saying that if any *real estate* shall remain unsold, “the same shall be forfeited, &c,” shews clearly the reason and object of appointing these agents; and they were only allowed three months after the departure of the principal to sell lands.

The enacting clause is expressly limited by the purview of the proviso it recites; the legal and true construction of it must follow the object and tenor of the act of 1777, and the rights secured under the proviso, are sacred from the operation of this clause.

Let me only add, that the 20th section† promises an indemnity. The legislature certainly had in view, the possibility of its being otherwise settled by treaty,

These are, the several acts of Assembly, relied upon by the defendant; we will now consider the first plea, on the case made in the pleadings, independent of the treaty of peace.

I. It will be recollected, that the plaintiffs were persons within the very letter of the act of April 1777, being “merchants who then traded, and had traded &c.” Sound policy and the safety of the state, required that these people should be separated from us; and the principles of natural justice required also, that although they might be personally inconvenienced, their natural rights should not be violated.

The proviso contained in the 6th section, is a solemn recognition of the principles of natural law,‡ and this act of national justice reflects the highest honor upon the legislature of this country.

As soon as these people made their election, and signified their intention to remain under the old government, by refusing to take the oath of allegiance prescribed by the acts of 1777, they became immediately aliens to the new government, and their real estates were subjected instantaneously to all the consequences of alienage. In order to prevent this mischief, which would have been attended with such glaring injustice, agreeably to the principles laid down by *Vattel*, their personal rights were respected by the legislature, they are authorized to sell, &c. &c. that is the right of citizenship, is *pro hac vice* continued. They have liberty to export the whole amount in produce, (naval stores excepted.) This very justly assumes the appearance of liberality and moderation, while the measure was dictated by the wisest policy. The exportation of money or specie might have been a serious injury, before the extent of paper credit was known; the other mode, in many instances, enabled our citizens to pay for their purchases, while it furnished a market for their produce, which had already accumulated on the hands of the planter, and threatened him with an entire loss.

It may be important to mention here, the motive which doubly

†3, 1779, 2, 384. ‡*Vattel*, 30.

influenced the legislature to be entirely silent on the subject of *debts*. The effects of the war were already felt; the citizen would not have been in a condition to pay—and even a partial collection must have drained the country of all the specie it possessed. It is but a justice due, however, to the legislature, to shew that this regulation was extremely beneficial to the merchant. Money must have been raised with difficulty, in so short a period, the exportation of produce was in the line of his business, and might enable him to fulfil his foreign engagements; the case of the merchant appears to have been particularly considered, and those mischiefs, naturally the consequence of political revolution, and so destructive to trade, and so distressing to this useful description of men, were averted and alleviated as much as possible.

In this analysis of the clause, the collection of their debts is never brought into view, nor does the expression, or any thing tantamount occur. The words “and after satisfying all just demands,” “to export the amount &c.” evidently relate to the sales of their estates, and is to be considered in the light I have already stated it, as an act of policy and justice; nor will they be considered as obliged to export the whole amount, although that privilege was granted,

This construction, in addition to the weight it acquires, from being consistent with reason and natural justice, on which the Assembly appears to have acted, is warranted by the whole latter part of the clause, “if any real estate should remain unsold &c.” This operated by way of penalty in this instance, and is a full expression of the legislative mind; and the penal part of the act will not, on any principle, be carried beyond the letter, or what is much stronger, the particular case stated by the legislature itself.

These observations are made to shew the true ground on which these people stood, and their rights, as recognized by the legislature, and sovereignty of this country.

The result is, they departed with all the rights of alien enemies, according to the laws of nations, with the following additional rights and privileges.

Their persons were protected from military arrest, during their stay.

Their property from capture on exportation.

Their real estates from escheats, by the privilege of sale.

Their personal estates to be managed by their attorneys or agents, and under the implied protection of the government.

Their debts not being mentioned, may be considered as untouched, and are clearly included under the situation of their personal estate.

It remains now to be shewn, that the debts of persons thus situated, are not within the purview of those sections of the act of October 1779*, relied upon in this plea. (*Here the clauses were read.*)

*3, 1779, 2, 379,

1. It has been observed, that the first part of this act, that is, these clauses, have taken for their ground, the act of November 1777, chapter 17.*

2. That the descriptions, mentioned in the preamble and enacting clause, do not include the case of persons compelled to depart under the act of April.

3. That this law evidently operated only on those cases which had not been before acted upon.

4. That these persons are expressly excepted from the benefit of that act, and of course from its penalties which were made the express consequence of non compliance: and this was the case, whether they removed themselves, or were removed by the compulsory authority of the magistracy.

The clauses of the act immediately under consideration, expressly refer to the act, chapter 17, and are built upon it. They are therefore, by every rule of law to be considered together as one act. That the only consistent, and of course legal, construction that can be put upon the 2d and 3d sections, as they may regard the plaintiffs, is the construction I before submitted to the court, viz, that they operated as an office found as to the real estate unsold. That where the words debts or monies occur, they must refer to the cases of persons differently situated.

Again, the fourteenth section expressly contemplates the debts and case of the plaintiffs, which shews that the legislature considered them as two distinct subjects or cases, and that the plaintiffs were not within the purview of the 3d and 5th clauses.

However general the expressions may be, it is clear they cannot cover the case of the plaintiffs, while the act of November forms the rule of construction, and a rational consistency is required in the several parts of the same act. To argue otherwise, would be to turn the acts of 1777, those acts of justice and beneficence, into a snare to these people, and to attribute to the legislature, a species of speculative policy, equally unworthy and unmerited; while they themselves were asserting the rights of man, and solemnly avowing their reverence for the principles of natural justice.

II. If however, this point should be adjudged against the plaintiffs, it remains to be considered, whether the payment made to the public commissioners is not among the impediments removed by the treaty of peace.

Before we enter upon the examination of this part of the case, it may be proper to consider some general objections made by the counsel for the defendant, to the authority of the treaty. It is alledged that congress were a mere executive body, a sort of council who could only recommend; that the articles of confederation conferred no absolute powers, and that the validity of the treaty depended upon the sanction of the individual states. It follows from the very nature of a

confederacy, which is formed by an association of sovereigns, that there must be a certain distribution of the sovereign power, between the constituent states and the confederacy. Thus the individual states retain those portions of sovereignty, which are necessary for their internal government and police; and congress became the exclusive deposit of those powers, which were necessary for the preservation of the Union, their common defence, and the regulation of their affairs with other nations; and it will clearly appear by the instrument itself, that the power of making treaties was exclusively lodged in the congress of the United States. By the 1st article, each state retains every power, jurisdiction and right which is not, by this confederation, expressly delegated to the United States in congress assembled, and by the 9th article, the congress of the United States in congress assembled, have the *sole and exclusive right and power of determining on peace and war, offending and receiving ambassadors, and of entering into treaties and alliances.* Congress then had the sole and exclusive power of making this treaty, on the part of the United States; and were alone competent to this act of sovereignty: no power of this kind remained with the states. From what *data* is it then inferred, that treaties of this kind depended upon the sanction of the states, for their legal validity? The means of carrying treaties into effect, it is true, remained in many instances, at that time with the states. Congress had full power to make such contracts, but they had not the same degree of power over the means of execution. Thus in 1787, there existed no federal judiciary, and the comparative authority of laws and treaties depended upon the sense or judgment of the state courts: and hence resulted the necessity of those repeated applications from congress to the states, requiring them to carry the treaty into complete effect, which had then become the supreme and positive law of the land.

It is also contended, that if congress had power to bind the states by a treaty as to some things, it was acknowledged and understood by them and their agents, that they had no power to repeal or otherwise affect the confiscation laws: and Mr. *Baker* relied upon some resolutions of congress, the journals and correspondence of the negotiators, and the opinion of members of the British parliament, as satisfactory evidence of their assertion. It would perhaps be a sufficient answer to all this, to say, that these documents relate to the object of the 5th article, which, as will be shewn presently, never contemplated debts. But without drawing into question such evidence as the progress of a negotiation, where simulation and feecy must always act a considerable part, I beg leave at once to oppose, to all this, the letter addressed by Congress, to the states in April 1787, in which they declared and demonstrated that Congress alone possessed the right, not only of making, but of interpreting, restraining, or counteracting the operation or execution of treaties "which on being constitutionally made, became by the confederation, a part of the law of the land, and as such, independent

of the will and power of the legislatures."

To this, the court will permit me to add the opinion of Mr. *Jefferson*. "It results," says he, "from the instrument of confederation, among the states, that treaties made by congress, according to the confederation, are superior to the laws of the states." This is not offered as an authority by which the court are positively bound, but as the opinion of a respectable civilian, delivered upon an occasion of great importance, and where the present question was directly under consideration; and this opinion he asserts, was supported by the general sense of the states, and of those gentlemen who were of the profession of the law.

Whatever doubts may have been entertained by some men, respectable for their learning and talents, whether the treaty could have been executed by the rigour of its own authority, it appears to be generally admitted, that by the instrument of confederation among the states, the treaties made according to that confederation, became superior to the laws of the individual states.

Treaties derive their authority as law, from being the act of the sovereign power. The safety and prosperity of the nation are involved in this high act of sovereignty, and thus from necessity, treaties have always been considered as paramount to ordinary laws. Every community possessing sovereign power, may enact laws to bind its own members, but rightfully they have no authority to bind others. Thus treaties acquire their authority from the joint assent of the sovereign power of those nations making such treaties, and to the citizens or subjects of those nations, they become *positive law*,[†] a law of the most sacred obligation, and of the highest importance to the tranquility, the happiness and security of the human race. *Vattel*, p. 11, 12, *sections* 24, 27, *Vattel*, 2, b. c. 12, § 163; *Burl.* 2 vol. c. 9, § 6, *ibid*, c. 14, § 3.

Thus, a treaty partakes both of the supremacy of a law, and the obligation of a contract. The act of Assembly mentioned in the pleadings, and the constitution of the United States have left no doubt on the subject of the treaty being *now* the supreme law of the land.

It is upon this double ground of its supremacy as a law, and its operation as a compact, I contend, that all acts of the state and its own members, with respect to debts of this description, were not only repealed, but even to be considered as a nullity, and as if they never had existed, with respect to the creditor.

The words of the 4th article of the treaty, are, "it is agreed that creditors on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts heretofore contracted."

This article, the counsel opposed to me has thought proper to consider, in two points of view, viz. as standing alone, and 2dly, as connected with the 5th and 6th articles. And it is alleged, that the true operation of this article depends upon the sound con-

[†] *Jefferson's Corr.* p. 48, § 40. *Irredell's Rep.* 648.

struction of the word "creditor," which is said should be confined to the creditor of such debts as were due at the time of making the treaty. The word creditor is indeed a relative term, and we suppose an existing debt. Those debts of which a person would be creditor under the treaty, received however, a precise and definite description, by the latter part of the article, in the words "all *bona fide* debts heretofore contracted." If the article had been drawn up in the words mentioned by the attorney general, doubts might have arisen with regard to the effect of confiscation, or sequestration and payment. But the phraseology adopted by the commission has excluded all doubt, the sole designation being the creditor of debt heretofore *bona fide* contracted.

It has also been observed, "that the words legal impediments should be restricted to disabilities to sue, the right of bringing suit, not the right of recovery," this is an unfortunate criticism, as the very tenor of the article imports the recovery of the full value in sterling money, and embraces immediately the right of recovery, and the attainment of substantial satisfaction, for all debts *bona fide* contracted. The law of Nations restored the right of suit, and the treaty expressly gives the right of recovery, notwithstanding any impediments enacted during the war.

To illustrate the construction imposed by Mr. Baker, he infers that the words "either side" mean on one side, creditors resident in Great-Britain at the commencement of the war. There is certainly nothing connected with the expression that will warrant such an inference. The phrase creditors on "either side," appears to have been selected, because it drew a plain and clear line, between the creditor and debtor, contemplated by the treaty. All distinctions of British subjects taken from their residence, are blended in the common designation of a creditor, on the side of his Britannic Majesty. It is no longer a question, whether the creditor resided in Europe or the West-Indies, or in the districts in the possession of his Majesty's arms in America. Some reliance is also placed upon the words "sterling money," as evidence that the debts contemplated, were such as were due to merchants or others, resident in Great-Britain, that the debts now in question, is proclamation money. This objection is easily answered, the colonies had emitted paper money of different denominations, and proclamation money had no particular value, but the current rate of exchange. The United States had issued paper money which had depreciated to nothing: hence it became necessary to have reference to some established standard of value, to avoid the misfortune of mere nominal recoveries, in the paper money of the states.

These remarks were concluded by an assertion that the article was vague and uncertain, and that its application to any case should therefore be attended with great caution. As this was not shewn, I can only answer, that it appears to me, the terms used in this article are the most comprehensive and unequivocal that could possibly

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adopted, both the contracting parties appear to have been desirous to exclude all ambiguity, and the possibility of misconstruction: "debts heretofore contracted," avoids all distinction that might create disputes and intangle justice, and entirely excludes every enquiry relative to confiscation or forfeiture in any form or shape whatever, the sole description being that of "*bona fide debts heretofore contracted.*"

Thus, therefore this article operates equally on all contracts which had originated before that time, and all the impediments to recovery, which had arisen out of the war; there is no exception as to the nature of those impediments, whether they depended on the act of the state itself, as a mere act of confiscation, or upon the state and one of its members, as a payment with a receipt and charge; and when an act, says *Vattel*,* "is conceived in clear precise terms, there can be no reason to refuse the sense which the treaty naturally presents."

Some rules of interpretation have been applied to this article, which I will take proper notice of, while I examine this article, by the same maxims laid down by the most eminent writers. But I hope it will not be taken as an admission, that there is any thing doubtful or equivocal in the text, or that the court are at liberty to depart from the rule last mentioned.

The impediments contemplated by the treaty varied in the different states, and even in the same state. Some cases were only acts of sequestration, in their mere declarations of confiscation, in some they amounted to confiscation and collection or payment. This latter impediment existed in the principal debtor states, the payment which had been made to the public was merely nominal, and if it had been otherwise, the creditor had no certain relief against the states: these circumstances must have been known and considered by the commissioners, indeed they had every reason to believe that this would be the principal existing impediment in Virginia and this state. Is there any reasonable ground to infer that this impediment, the most prominent feature in the group, should have passed unnoticed, and be considered as an exception? If, says the same author, "there is any obscurity, we should seek for what was probably in the thoughts of those who drew it up, and interpret it accordingly."

It is also objected, that the state stood as assignee of the creditor, at the payment to the state, was as good as to the original creditor, and the debt being so paid is extinguished, and there was neither debtor nor creditor at the time of making the treaty." This jingle of words imposes for a moment, on the ear; but when examined, is found to be no more than a conclusion drawn from premises neither proved nor granted. If the state had really been the assignee of the original creditor, a payment to her would certainly have been good against my clients: but she only assumes the authority to receive without the consent of the obligee, and a payment to her is no more.

* p. 269, § 363. † B. 2, c. 17, § 278.

than a payment to an officious stranger, which depends for its validity on the subsequent assent of the creditor; it may be said that this assumption of power to collect debts, is among the rights of war. To which I answer, that the rights of war, when exercised, always depend as to their final validity, on the same things as settled by the treaty of peace. Thus perhaps, if debts had never been mentioned, and certainly, if those payments had been sanctioned by the treaty, as in the cases which arose of the treaty between England and Denmark, anno —, as appears by the cases of *Weymburg against Seich*, 21 *Car. 2*, in *Case of Trower against Hassell*, 1 *Ca. in Ch.* 173, the payment would eventually have been sustained in this court as a legal payment: but when the contrary is expressly stipulated, the payment becomes of no validity, and it follows of course, that there is now both debt, debt, and creditor. It appears from the authorities I have read, and the nature and obligation of treaties, that the commissioners of America had power to bind the nation collectively and individually. The payment under the act of Assembly, was a transaction between the state and one of its own members, *that is to say*, between the defendant and the defendant, represented in a moral capacity, who, as to this question, should be considered as one person: That in the treaty, the state and its member hold this honest language: we agree there should be no lawful impediment, or in plain language, the manner of payment and discharge we had fixed upon, during the war, without your consent, shall be considered as a nullity, whatever form it may assume. Thus the treaty works not only as a repealing law, operating a repeal *ex tempore* of all existing laws to the contrary; but by way of compact also, wherein one of the contracting parties does agree, that the things done under *those laws* should be considered as void; of in the language of the treaty, "no impediment." The result is no more than this: the state remains under a moral obligation to reimburse the citizen, as it expressly agreed by the law of 1779, what it really received; and the individual is in *statu quo* with respect to his creditors. Treaties are considered as the voice of necessity: the state and its member admit the payment was originally more matter of form than substance; a mere family accommodation, which could be easily again adjusted in the same manner. Trifling circumstances, like these, would never be seriously opposed to the obligations of private faith, the claims of natural justice, and the peace and safety of the United States.

It is objected that this construction involves a sacrifice of private rights: and, therefore this construction should not be extended to include this case. Let it be observed that the construction we contend for, is not what is understood as the extensive, that it is the natural and common import of the words* with regard to a natural and necessary object: it is not bringing an expected case within the mere meaning of the contract, it is not a reliance upon any thing so uncertain

*Vattel, § 283.

and evanescent as the spirit of the article, which may depend entirely upon the ideas of the commentator of the meaning of the enactment : we rely on the plain and common import of the words.

Let it also be remembered, that these rights, if they may be so termed, were certain rights acquired by the war, and therefore properly the subject of treaty. That the real rights of individuals, properly acquired, may be sacrificed by the public on such occasions, is testified by numerous examples and authorities. And as this sacrifice was merely nominal as to the American citizen, should he never be reimbursed agreeable to public faith, it is not to be presumed that this matter was considered by the commissioners as a thing of any consequence, or an exception. On what ground of justice could they make an exception of it ? It must also be remembered, that this was a part of the price of peace, and the independence of America. No humiliating terms. It is only in affirmation of the law of nature, and of nations, that individuals should honestly pay their debts, that the inconvenience of wars should cease with them, and that both governments should mutually contribute to the establishment of justice and moral order.

And again if, in general, the rules of construction of treaties, confine the expression, used by the parties, to the object meant to be acted upon ; then in treaties of peace, the war, and the affairs and transactions arising out of it, are the natural and certain objects upon which the treaty is intended to operate, unless the contrary clearly and expressly appears ; then from the rule it must follow that impediments created *during the war* must have been the peculiar and immediate objects of this article*. This is according to the rule "giving the expressions the sense most suitable to the subject."

Another ground taken by the counsel for the defendant, was this : "that at most the treaty was a mere repeal of the existing laws, that it could not effect the payment, that being already done under the law, was certainly valid." The doctrine that a simple repeal of a law does not nullify the acts done in consequence and by virtue of the act is admitted : but the court will recollect, that I rely not alone on the supremacy of the treaty as a law, but upon its operation as a compact, the nature of which I have already illustrated. I suppose it was intended to be inferred from the remainder of this objection, and the observations made upon it, that this clause would be satisfied by limiting its operation to any impediment arising from any law then in being, or hereafter to be passed to the prejudice of the creditor's right. This is giving the objection its whole force, and perhaps more than was intended.

It is answered, that obstacles *existing*, not those which might probably exist hereafter, acts of war and violence, not of policy and peace, are the subjects upon which this article is to operate. It is not to be fairly inferred that they would pass over an existing mischief or impediment, to provide against a possible or eventual one :

*Vattel, p. 378, § 280.

that they would sedulously insert an article to nullify acts of the legislature, which were thenceforward at all events to be a letter. To repeal a law which not only already had its effect, was by the general operation of the treaty, arrested as to all its operation, instead of doing away the impediment it had produced to a matter past, instead of a thing existing; to a thing of no consequence, abstracted from the effect it had produced, and leaving the effect to exist, in all its vigour and consequences. This interpretation, drawn from the natural connection and relation of things and existing circumstances, forces itself irresistibly upon the mind and is agreeable to the most approved authorities.*

It is also asserted, that this construction of the article is contrary to the maxim contained in *Vattel*, § 305: as it would change the present state of things. That enlightened writer there says, that "in case of a doubt, the presumption is in favour of the possession," but here, may it please your Honors, is no doubt, a clear precise and explicit stipulation. In the same section it is stated, "that the case of him who seeks to avoid a loss, is more favourable than that of him who desires to acquire a gain!" the case of my clients might rest on these lines alone. Shall the plaintiffs lose a debt *bona fide* contracted, for which the defendant had real value, or shall the defendant gain the advantage of discharging that debt, by the nominal process of paying it to the public in depreciated dollar bills?

If the leading object in treaties of peace, is to heal the wounds inflicted by the wars, and where it is practicable not only to effectuate justice, but to restore things to their ancient order, and the former conditions of peace; then it must have been an important object with the plenipotentiaries to place individuals in *status quo* with regard to each other; to put the attainment of justice in the power of the creditor; and to restore private confidence so essential to the happiness of mankind, and the prosperity of an infant country like the United States.

The writer to which I have so often referred, also says, that "as soon as we know certainly, the reason which has determined the will of him who speaks, we ought so to interpret his words, as to apply them in a manner suitable to that reason." Now the reason in this case is evident, the Americans were largely indebted, particularly in Virginia and this state to the British merchants: the states had attempted to confiscate and collect those debts, even in money depreciated to nothing. Justice was to be done to the *bona fide* creditor, and this was completely effected by removing those impediments which had arisen by the interference of the state, during the war: and this rule goes the full length of the present case.

An authority has been produced to shew that a statute against right and reason is void. And it is alledged that the treaty must operate this injustice: and it is against right and reason, that a man should pay twice, with interest and costs. There is nothing either

* *Vattel*, p. 2, c. 17, § 270, 271, 280, 282, 283.

unreasonable or unjust in the present case. The creditor trusts upon the reasonable expectation of being fully and punctually paid ; and every honest man deems it mere justice to pay his debts ; therefore between the creditor and debtor, this is surely "right and reason."

As to the payment made to the public.

The state foresaw that this debt might become the subject of treaty or negotiation, in which the right of the creditor would be saved, and expressly engaged by the 20th section of the act of 1779,* to reimburse the debtor. Take this act and the treaty of peace together, consider them as one act : the result is, if you will pay these debts into our treasury, if by the treaty of peace, you should be obliged to pay them to your creditor, we will indemnify you ; and thus complete justice is done to all parties.

An objection is also stated on the authority of *Vattel*, p. 651, § 32, alledging, "that Great-Britain, must have been the proposer of this article, being for her benefit, and the terms upon which the granted our independence." It should be observed, that these observations are not perfectly correct: the article itself is mutual, and may be said to move from both ; and made for the benefit of "creditors on either side." But the authority is this, that in *case of doubt*, the interpretation goes against him, who gave law in the treaty. If the documents, adduced by the Attorney General, on Saturday, are entitled to credit, then, the United States, not Great-Britain, gave the law on making of the treaty, and the interpretation of course should be against the citizens of the United States upon his own doctrine. But the fact is, that either, when plaintiff has the right to claim the full benefit of this article, for it is mutual : and it is a maxim of the common law, as well as common sense, that the words of a grant shall be construed most strongly against the grantor, and that a promise shall be construed in that sense, which the promisor had reason to believe it was received. Thus America may be conceived to have said : relinquish all claim to the sovereignty of the United States, and acknowledge our independence ; we ask no more, all debts shall be honestly paid ; we are contending for the establishment of our political rights, not for the destruction of moral obligations.

It is also a maxim in the construction of treaties,† "that if he, who can and ought to explain himself, has not done it, it is his own loss, he cannot be allowed to introduce *subsequent restrictions*, which he has not expressed." Although this article is obligatory on both sides, this promise was known to proceed from the side of America. If her commissioners intended to make this case an exception, why did they not say, provided this article shall not extend to payments of this kind : the import of the words is general, and as I have shewn, plainly covered every case. If this was to be an exception, the necessity of its being expressed, was glaring and evident ; it was

* 3, 1779, 4, 384. † *Vattel*, b. 2, c. 17, § 264.

therefore certainly necessary; otherwise in the language of *Vattel* there can be no sure convention, no firm and solid concession; they may be rendered vain by subsequent unmentioned limitations.

On every occasion where a person has, and ought to have, in view his intentions; it is a rule that we must take that for true which he has sufficiently declared. I have already submitted my observations on the plain and natural import of the words, which certainly contain a sufficient declaration of the intention of the contracting parties.

There are some common law rules, which will also apply to this case. There, that construction is always sustained, which insures the greatest simplicity and certainty; and that construction is always selected, which would be predicated upon indefinite and undescribed wrongs. Thus when one party gives a general warranty; the common law will not extend the warranty to make the warrantor answerable for illegal claims, or tortious acts. Upon this rule he is not supposed to warrant against the lawless acts of individuals, nor will the law presume that such acts will be committed. Thus the existing impediments, the effects of a violent war, were the objects upon which this treaty were to operate, the commissioners would not presume, nor will the court now, that upon the return of the blessings of peace, such acts of violence would ever again take place.

Again, to suppose that congress meant by this treaty, couched in such general language, that an existing impediment should remain, would be supposing them to act with that kind of subtle and knavish duplicity, which the law will neither presume, nor admit. Nations, says *Vattel*,† are not less obliged than individuals, to act with candour and rectitude, and have regard to equity in their transactions with each other. It is true, he admits "that the powerful sometimes openly abandons the honest, for what appears to be the more useful; but it frequently happens for the happiness of the human race, that this pretended utility becomes fatal to them, and they are severely punished for such mockery of morality and justice."

The ancient and intimate connection, between the United States and the British government, as one great family, connected by the ties of blood, impressions of interest, and habits of intercourse, must have formed strong and powerful inducements to the members of both governments to heal the wounds of the war, to obliterate all past differences; so as to re-establish that good understanding and friendship, that would ensure perpetual peace and harmony. These are the objects so strongly expressed in the preamble of the treaty: they are not a mere formula, as in common cases, but a natural, sincere and honest expression of the public mind and sentiment. These important and interesting circumstances, also furnish a rule of construction recognized by the law I have already read, and requires of us to determine any question arising upon this treaty, upon the most liberal principles of equity and reciprocity.

* *Vattel*, as before, § 266. † *ib.* 12. c. 13.

I have only to add on this part of the case, that if treaties are to be construed favourably, as writers term it, surely it is the dictate of equity and more consonant to justice, that the state should reimburse the debtor, who is its own member, the nominal sum he paid, than that a *bona fide* creditor should lose his whole debt; that private faith should not be affected by political wars; that individuals should not suffer by the lawful exercise of their natural and political rights. Certainly nothing can be more repugnant to justice, than that the strongest moral obligations should be dissolved by a nominal process, a process that resembles magic, more than reality; that a mere assumption of power, should annihilate obligations, which in a moral sense are immutable.

2. Thus far the article has been considered, as if it stood alone. The court will permit me now to make a few remarks on the doctrine held by the other side, considering this article connected with the 5th and 6th; and this mode, the counsel infers, is proper on that rule of interpretation, founded upon the connection of the discourse. Where articles or clauses relate to the same subject, they must and ought to be construed together; their operation should be consistent, and their construction governed by the same principle: but the 4th article is a special provision for debts, has a single aspect, and stands simply by itself. The 5th and 6th articles have quite different objects, as will be seen by looking into them. It is said that the words, "provide for the restoration of all *estates, rights and properties*," admit the right of confiscation and include debts. This expression occurs four times in the 5th article: the last affixes a precise meaning to these terms, viz. "Congress shall also earnestly recommend that the *estates, rights and properties* of such last mentioned persons shall be restored to them; they refusing to any person who may be now in possession, the *bona fide* price, when any has been given, which such persons may have paid on *purchasing* any of the said *lands, rights or properties* since the confiscation." Thus the *estates, rights or properties* here meant were clearly such as could have been sold by the public, and possessed by some individuals at the peace, for which he might have paid valuable consideration. No man will surely pretend to say, that this could be the case of a debt under the laws of this state, or any of the United States. It is plain that this whole article contemplated the lands, slaves and other property which had been sold by the commissioners: the debts had been already fully provided for in the preceding article.

It is said there is no difference between debts and other property. There are many important differences, besides the striking one stated in the treaty, the debts were attempted to be collected by the public; the lands were sold to individuals for valuable consideration, they had probably passed through various hands, and become the subject of improvements, and of course of attachments; justice as well as policy, forbid that such property should ever be returned: it was said that this property was of trifling value compared

with the debts. This is a great mistake, the lands alone in this state were equal in value to ten times the amount of debts due to British subjects, and this property congress had clearly no power to dispose of, the sovereignty of the soil being vested exclusively in the respective states.

It is also said, that this article makes three descriptions of men, with different rights: That the plaintiffs are in the third, and most unfavoured class, that the court are bound to regard a distinction made by the treaty itself. This conclusion is the most strained and incorrect, that has been made on the part of the defendant. It is recommended, that they shall provide for the restitution of all estates, belonging to real British subjects; 2d. for the restitution of the estates, of persons resident in districts, in the possession of his majesty's arms; and *who have not borne arms against the United States*

3. And that persons of any other description shall have free liberty, &c.

The first description plainly includes all persons born in the allegiance of the king of Great-Britain, and who had not abjured the same, and taken the oath of allegiance to the states.

As to the second class: it was known that the enemy's principal posts commanded considerable districts of country, beyond the immediate works of the place, as at Charleston and New-York: that in these, numbers of inoffensive citizens were suddenly involved in their country's misfortunes, without the means of escape or removal: that many were chained to the spot, by the claims of a helpless or suffering family, who depended upon them for sustenance. They had not borne arms, and only yielded a passive submission to the chance of war; reason appeared to impute no crime to people of this description, and they certainly merited some consideration, and in the treaty are placed on a footing with real British subjects. A certain delicacy seems to have dictated the terms used in describing the third class, "persons of any other description." This, without using, mortifying or distinguishable terms, included the fugitive from justice, and the blood-stained traitor, or in other words, the citizen who had borne arms against the United States, in contradistinction to the citizens of the 2d class who had not. The plaintiffs never were citizens of the United States, no crime attached upon them, they were born in the allegiance of the king of Great-Britain, and when called upon by the laws of the state to make their election, they solemnly refused to abjure the same, thus they were, and continued to be real British subjects, and are plainly neither included in the 2d, nor 3d classes of the 5th article.

The 6th article is a common and necessary stipulation of reciprocal amnesty, and predicated upon the spirit and policy of conciliation, and the justice of shielding individuals from suits and prosecutions, for the common violence of the war. Such a stipulation was proper and necessary, whether the treaty stood with or without the 4th article, and has indeed no connection with it.

We will now proceed to consider the 2d, 3d, and 4th pleas, as standing upon the acts of Assembly.

The second plea is grounded on the act of November 1777, *ch. 17*, and the two first sections of the act of October 1779, alledging that thereby the above debt was confiscated and fully forfeited to the State, that therefore, &c.

It has been already observed, that the act of November 1777, *§. 17*,† does not contemplate the case of the plaintiffs. "All persons who had removed themselves, or had been removed under the compulsory authority of the laws, or who had removed to avoid taking the oath of allegiance," are expressly excepted, and are clearly out of the purview of the act.

The people of the above description had been solemnly called upon to make their election. That election was irrevocable, they were obliged to depart, and it was made death by the same law to return. While this law remained unrepealed, if they returned, they forfeited their lives and fortunes; and supposing the other act to comprise them, if they remained in foreign parts, they forfeited their estates. To avoid this injustice and absurdity, the proviso of the 4th section excludes them positively from the purview and operation of the act.

This construction must govern the operation of the act of October 1779. The clauses relied upon in this plea, are expressly grounded upon this act*. This is clearly shewn by the preamble. The plaintiffs, with a number of others, are named in the second section, of that act, as having incurred the penalties of the act of 1777, the fact was notoriously otherwise, and so it stands upon the pleadings, and the only rational construction that can be put upon this part of the act, as it regards the plaintiffs, is the one I have already submitted to the court, in the argument on the first plea: of which I beg leave to avail myself; only mentioning that the conclusions were, that the act could not comprehend this debt.

That the legislature had rendered a compliance with the act of November impossible.

That this act could only operate as an office found, with respect to the lands unfold.

And that where the words "debts or monies" occurred, they must be applied to the case of *others*.

It is only necessary to repeat, what has already been proved in the argument; viz. that it could not mean the money owing to them, because it required them to *sell* and *depart*.

It could not proceed on their adherence to the old government; because they had made it high treason to return to the new community.

All compliance with the act of November 1777, was rendered impossible: their real estates unfold, were already forfeited or confiscated: nothing more was necessary, except directing a sale, and

this was ordered in this act of October 1779. This construction gives it operation with regard to them, and the only construction and legal operation it can have, where the words, "for money debts" occur in this act, it must be supposed to apply to the others named in the act, who were in a different situation whom there were many; and this satisfies the act without inconsistency or absurdity.

Again, to have required of these people to have collected debts, would have been demanding of them to perform what the laws had rendered impossible. The courts of justice were shut up from 1773, until November 1777, and the first act that established them excluded the plaintiffs from the benefit of the executive authority of the laws. Thus there were no courts at the time of their departure, and none afterwards in which they could sue. On what grounds will it then be argued, that these people were to collect their debts before their departure; or how will it be said that their agents could effect it afterwards?

The 14th section of the same act*, intending to provide for the case of the plaintiffs, shews clearly that they were not included in the former part.

III. The third plea of the defendant rests on the 14th section of the same law; averring that the plaintiffs refused to take the oath of allegiance, and were compelled to leave the state by virtue of the act of 1777, and that they had not appointed any lawful agents to receive and give discharges for debts, that therefore, &c.

[The section alluded to was read.] The provisions of the expulsiⁿ laws of 1777; are the express ground of this section, and the preamble assigns two causes of confiscation, "failure to sell their real estates, and the omission to appoint attorneys or agents to receive and give discharges for debts."

The first reason is perfectly consistent with the provisions in both of the acts of Assembly. The other is evidently founded on mistake. The act gives them leave to appoint an attorney to sell and dispose of their estates; but not a word is said about "receiving and giving discharges for debts." The object of appointing those attorneys, and their duty are already pointed out by the final part of the clause; viz, "and if any real estate," remains, &c.

The enacting part of this clause even detachedly considered, upon its own letter, admits of no other construction. 1st. 'The lands not bona fide sold for valuable consideration actually paid.' This part of the clause has received a fixed construction in our courts, in the suits of *N. Long*, commissioner, against *Hill*, in Halifax superior court. The counsel for the state relied upon this part of the act; it being in evidence that *Hill* gave a bond to *M'Clellan*, for the consideration money, which was unpaid before *M'Clellan's* departure, who was the original owner, and one of the persons named in the confiscation act of 1779: the court said the act would not war-

at such a construction ; that the bond was a payment, and that it was not necessary the money should be paid upon the bond ; it therefore follows if it was not necessary to pay, it was not necessary to receive.

This might give a rule of construction for the remaining part of the clause, were it necessary. But this part of the law, has such a pointed and express reference to the acts of Assembly of April and November 1777,* that it must necessarily be expounded and controlled by them ; the words are, ' that all debts, not yet collected and appropriated according to the directions of the said acts shall be confiscated ;' then limit the operation to the requisitions of those preceding acts, and it follows, ' if those acts required debts to be collected, and they were not collected, then were they confiscated ; if the monies were to be particularly appropriated, and they were not so appropriated, then was the money confiscated.' Wherever the party contravened the direction of the act he incurred confiscation, but not otherwise ; the actst will speak for themselves. (*Here the acts were read.*)

The honour of this country is greatly indebted to that correct and enlightened mind that drafted the first confiscation laws, and formed them so perfectly upon the principles of natural justice, that their influence was felt through the whole system afterwards, whatever shape or form these laws assumed ; so that even in the present case, where it was plainly attempted, the arm of confiscation seems to have been palsied, when it attempted to violate property confided to the faith of our government.

It has been shewn in the argument on the first plea, that the principal could not collect because there were no courts to enforce payment, and it becomes necessary to observe more particularly here, that by the 101st § of the court law, the same act which opened the courts, excluded the plaintiffs from the benefit of it : † thus the collection became impossible. The state shut the courts against the agents also of these people, declaring they should not have the benefit of the laws to enforce payment, shall she then be made to say, ' you shall forfeit these debts, because you did not collect them ?' This would be imputing a degree of absurdity and injustice to the legislature that cannot be admitted.

I take it to be the same thing to refuse them the assistance of the laws, and to say they should not collect. When the law requires any thing to be done, it supposes all the ordinary means in the power of the party, and particularly that its own assistance is not to be refused.

If the legislature intended that their agents should collect, they would certainly have so expressed it in the same clause which they enforced the sale of lands, where if it had been the intention of the legislature, it would certainly have appeared ; the law and usage of nations preserved the obligations of their contracts, altho'

* 1, 1777, 2, 286, 2, 1777, 6, 324. † 1, 1777, 3, 284. ‡ Page 318.

they suspended suit and collection; the merchants were not to assume any thing contrary to the usage of nations, where in a case like this it was not otherwise declared.

The plain import of this clause† is this, their attorney may dispose and sell their estates, but there is no attorney to collect their debts, nor can it be implied from any part of the act, whatever reason militates against it.

The law of nations suspended the right of suit.

The act of April could not require it, because at that time there were no means of collection.

The act of November could not require it, for the same session it suspended that right by law.

Collection of debts is not an act of mere volition: time and means are both necessary. It is plain that debts were not contemplated, that they were not within the purview of this law, therefore, out of the operation of the 14th § in question, which is plainly borrowed upon the acts of 1777, by which it is expressly directed and controlled.

IV. The 4th plea is in substance the same with the second, though in a different form. The arguments submitted upon that will therefore apply to this plea, and I shall not trouble the court with a repetition of the same.

2d. POINT.

If however, these pleas are sustainable by the act of Assembly, it remains to be considered, whether those matters pleaded in bar, are not among the impediments removed by the treaty of peace.

Much has already been said on the import of the 4th article of the treaty, the precision of the terms in which it is couched, and the latitude of their operation, and it is only necessary to narrow their aspect, to shew that they include the matters stated in the 2d, 3d, and 4th pleas of the defendant.

This treaty, which all agree, was binding before in a moral sense, is now to be executed by the vigour of its own authority, and being the supreme law of the land, all laws that contravene the treaty are thereby repealed.

A mere repeal of the confiscation laws would have altered the situation of the debtor and original creditor very little, and must have fallen greatly short of the purposes of justice, and the objects of the treaty, thus it became necessary to go farther and remove "all impediments to the recovery of the debts."

If this expression should be limited to impediments created by laws existing at the peace, it would follow, that in all instances where there was a bare legislative act of confiscation, unattended by collection, payment or discharge, that the impediment of confiscation being removed, the debtor and original creditor were again in *statu quo*. This is expressly conformable to the doctrine laid down by *Bynk. 2 j. p. lib. 1, c. 7*, "If the prince really exacts from

his subjects what they owed to our enemies; if he shall have exacted it, it is rightfully paid. If he shall not have exacted it, peace being made, the *former right of the creditor revives.*" Thus, according to this celebrated jurist, in all cases where the money was not actually paid, the original right of the creditor would be revived, had the treaty contained no stipulation to that effect.

If this expression embraces all impediments created during the war, then every existing obstacle, every lawful impediment, enacted as created by the individual states, or the United States, are swept away. The impediment created by payment to the public commissioners was, in fact, the only one that rendered such a stipulation absolutely necessary; the acknowledged law of nations, would have been competent to give relief to the creditor, against the case made by the defendant, in the 2d, 3d, and 4th pleas.

Again, if in cases of payment and discharge, this construction should be held to operate a sacrifice of individual rights, and this should be considered as an objection in that case, no such difficulty occurs here: the sovereign power might rightfully relinquish its own claims to the debt. It appears to me that no question can be made; but that the treaty does away all impediments arising from any law then existing, to the prejudice of the creditor's right. This is no more than a stipulation on the part of the states, that they would relinquish all claims to debts due before the war, to *British creditors*. This, as I have said, they would rightfully do, if they could do any thing: they were competent at least, to restore what they had taken, and to stipulate that no future law should be made to affect their recovery.

It has been said, in the argument on the 1st plea, that the terms used in the treaty are clear, precise and unequivocal; comprehending every case in which justice could be interested. The mode of expression is the most happy that could be conceived, by which a few words answer all the purpose of as many sentences in other cases. If it was a mere sequestration, then the subject sequestered is restored, if it was such an act of confiscation, as might be said to divest the right of the creditor, the public claim is relinquished: the original right of the creditor is revived and recognized. Whatever the public right or claim was, or by whatever means it was acquired, it shall be no bar to the creditor's recovery of the full value of his debt: and thus, the creditor, with regard to his debtor, is put perfectly in the situation he was before the war.

Having considered the merits of those pleas severally, there are some general views of this subject, which, as they appertain to all the pleas I have postponed to this stage of the argument, *viz.* whether the acts of 1777, and the compliance of the plaintiffs, ought not to be considered in the nature of a compact, and how far the state of North-Carolina was bound by the existing law of nations?

The propositions of the legislature, in the laws of 1777, and the

consequent acts of the plaintiffs, should be considered as creating a solemn compact, *indissoluble* but by the consent of both parties.

The natural, and even civil rights of persons, on a separation and dissolution of the community, are in many respects, different from those of alien enemies, as will be shewn presently; these rights appear to have been considered and respected by the sovereignty of this country.

The 5th and 6th § of the acts of 1777, contain the stipulations and terms of the state. They are shortly these :

You may become a member of the *new* community, if you solemnly and publicly abjure your allegiance to our former sovereign, and take an oath of allegiance to the new government.

If you elect to continue under the old government, you must depart within 60 days.

You shall have liberty to sell and dispose of your estates, while you stay.

You may export the amount in produce.

It is expected that you will honestly pay your debts.

You must not export naval stores or provisions: they are contraband.

If 60 days should be too short a time to sell and dispose of your estates, you may appoint attorneys to sell and dispose of them, after your departure.

But if any real estate remains unsold for more than three months after your departure, the same shall be forfeited to and for the use of the public.

And if ever you return, you shall be adjudged guilty of treason, and shall suffer accordingly.

If you will neither take the oath, nor peaceably remove yourself, in conformity with the act, the county court shall send you by force to the West-Indies, at your own expence.

The election of the party, under this act, made it at the same moment, binding upon himself and the state, in the nature of a firm solemn compact, irrevocable in its very nature, but by mutual consent; decided and immutable in its consequences as to him, and certainly reciprocally so as to the state.

Then by taking the oath, the state conferred the rights of citizenship, and he subjected himself to the obligations of a citizen; obligations he could not dispense with afterwards.

If he once departed, his election was made forever, for any thing that appeared; and it became death to return.

In this case, the state on her part, entered into several stipulations.

Those that are express I have already mentioned, there are others that are necessarily implied; for example :

It is expressed that they shall depart in sixty days, it is also implied that they shall not be made prisoners of war during their stay or departure.

It is expressed, that they may export the amount of their sales

produce: this also includes an exemption from seizure on the high seas, although not expressed.

Naval stores and provisions are excepted; these were therefore to be considered contraband; and it follows from this exception, that all other produce might be freely and lawfully exported.

In like manner, in the clauses contemplating the property of the merchant, it is said: if your *real estates* remain unsold for more than three months, it shall be forfeited. This case being stated, is to be taken as a full expression of the mind of both parties, as to the extent of forfeiture, and it is then clearly inferred that all other property, and particularly their debts, remained untouched, because unmentioned. No other conclusion could have been formed, and they must have made their election, and departed under this impression, that their debts were confided to the protection and faith of our government and laws; and in this light it becomes binding and obligatory on the public. This is agreeable to Mr. *Paley's* maxim, a promise, says he*, is to be performed in that sense in which the promisor apprehended, it was received by the promisee at the time such promise was made.

This act was passed after the declaration of independence, when this state had fully assumed the faculties of a moral person or a body politic; when she was fully capable of binding herself and her citizens; when she had taken her place and rank among the nations of the earth; when she claimed those rights, which appertained to nations from others and became subject to similar obligations. These engagements required no particular diplomatic ceremony; they were an immediate act of the supreme authority itself, and must therefore be considered as an explicit and solemn pact between those people, and the sovereignty of this country. A mutual compact in which these people having performed their part, by removing themselves out of the state, the legislature or the state could not retract its consent, or discharge itself from the obligation she had voluntarily entered into, without the violation of every sentiment and principle of good faith.

This statement receives great weight from an act of the legislature, of November 1777, in the 101st § of the court law. This act describing these people, declares they shall not have the benefit of that law, but that all right of commencing and prosecuting suits shall be, and are thereby *suspended*, and shall *remain suspended* until the legislature shall make further provision therein. To prohibit the recovery of a debt, presupposes the existence of a debt. The rights of the creditor are here solemnly recognized, as well as those principles and usages of the law of nations, I have so often mentioned. This furnishes a strong and incontrovertible evidence of the sense of legislature at that time, of the nature and effect of the compact with these people.

Again, as the legislature, in stating the terms of their separation.

on, was silent on the subject of their debts. The fair construction they were to be considered under the protection of those laws, were equally obligatory on both, *viz.* the law of nations. So writers lay it down, as a positive rule of law, that the right of bringing suit is only suspended during the war. *Vattel*, indeed, mentions it as a usage introduced among nations, with the progress and extension of commerce.* We may be indebted for the observation to the general introduction of this rule among nations, to modern commerce, with many other blessings, attendant on improved social and civilized life : but it has certainly a higher sanction in its conformity to the eternal and immutable principles of justice.

The moral ground stated by *Vattel*, is that strangers may trust foreign subjects only from a firm persuasion that the general system would be preserved. How much stronger is the case of the plaintiffs ! The dissolution of a government is never to be presumed ; they were members of the same community ; their contracts were bottomed on the strongest ground of private and public confidence ; when they parted, it was fairly and necessarily implied from the terms of separation, that their contracts, independent of the law of nations, were to be held sacred from all the consequences of the war. *A fortiori*, they were at least to be left on the foot of the prevailing usage of civilized nations, at the time that the United States assumed their place among those nations.

According to *Grotius*†, the debts of individuals are not discharged by war. These are not acquired by the right of war. The right of collection or demand is only suspended. This doctrine is also sanctioned by the opinion of *Barbeyrac*||, whom *Vattel* respects, as of himself of good authority. These writers consider war in the language of the treaty, as a mere temporary impediment, which being removed, the debts retain their full force and obligation. This was without doubt, the idea of the parties ; it corresponded with the state of things at the time, and the conduct of the legislature, at that period, appears to have been expressly predicated upon the acknowledged law of nations. When the first act passed, there were no courts in which these debts could be demanded. When the second passed the courts were erected, but the same act expressly excluded the plaintiffs from the benefit of those courts ; very justly and doubtless on the principles above stated from *Grotius*.

In addition to these, I beg leave to add one more authority, not of so much celebrity as those I have already quoted, only because it is not so ancient. This authority is the opinion of Chancellor *Wythe*, in the suit, *Page's ex'rs.* against *Pendleton* and others, and although it may want the rust of time, it acquires additional weight from being given in a case arising out of the same war, and under circumstances nearly similar to the case at the bar.

This great man, so celebrated for his learning and judgment, holds
 * 6. 3. c. 5. § 77. † *Ld. Raym.* 282. ‡ 6. 3. c. 20. § 16. § 4. || 2. *Barb.* § 265.

the clear and decided doctrine; that the rights or laws of war and peace now established among nations, were as vigorous between the United States and Great-Britain, after the declaration of independence, as they could be between nations who had never been dependent upon each other; that upon their becoming distinct politic bodies, the rights and laws of nations immediately attached upon them. Indeed it would be difficult to shew any reason, why a community who claimed the rights of nations from all others, both for herself and her citizens, should hold herself discharged of *all obligations* to them and their subjects. Mr. *Wythe* has considered the war as a temporary impediment, in the same light that *Grotius* and *Barbeyrac* have done; as merely suspending the *forensic* assertion of the rights of alien enemies.

It should also be remembered, that the late war between Great-Britain and America, must be considered as a civil war. These wars originating in different causes, with particular objects, have been considered by all writers, in a light widely different from those usually denominated soldier wars.

This position draws several important consequences after it. The revolt of America, however laudable in the attempt, and glorious in the event, was a rising of a certain portion of the people, against the established supreme authority of the nation; thus every revolt supposes a superior during the revolt. The political connection is still supposed to exist, it would be a solecism to say that the inferior dissenting power could make laws to bind the superior. Again, during a revolt, all power is, of course, assumed or usurped. This usurpation or assumption can never constitute a right; hence, it is clear, that until the treaty of peace, the American states could not rightfully legislate for themselves, much less for the British empire, and this was the reason that the first article of the treaty, acknowledging the sovereignty and independence of the United States, and expressly relinquishing all claim to the government and territorial rights of the same, became an object of vast importance to America.

Lastly, it is a prejudice, too common with us, to connect the departure of these people in 1777, who only exercised their natural rights, with the subsequent conduct of those who became citizens, and afterwards basely deserted us in the gloomy periods of the war: but no two cases can be more widely different.

All writers, on the subject of government*, agree that a nation may change its constitution, by a majority of votes, whenever there is nothing in that change contrary to the fundamental principles of the original act of civil association; and in this case, all are bound to conform to the resolution of the majority. But when the question is to quit one form of government, and adopt another fundamentally different, as for instance, to change that of monarchy for a republic, although the majority may rightfully effect the change as to themselves, the minority are under no obligation to submit to the new government,

* *Vattel* b. 1. c. 3. § 33.

but may retire with their property and effects. These distinctions are founded on the broad basis of the rights of man, and the general policy of public peace and safety.

Thus stood the rights of my clients, had no compact, no treaty ever existed. But in addition to the act of the legislature, which have stated to the court, it must also be noticed that the mutual separation of Great-Britain, and the United States, into two distinct and independent nations, was by mutual agreement. The basis or rather preliminary of this national compact, was the declaration of independence: the consummation was the treaty of peace. Taken together and not separately form the real act of separation: and in construction by a settled rule of law, are to be considered together. In the one, the great national rights are asserted, and acknowledged in the other. Here also the rights of the citizens and subjects of the two nations are recognized and confirmed. Viewing this compact as a law, it is only declaratory, or in affirmation of the law of nations and the universal principles of natural justice. Viewing it as a convention, it is adding the warranty of the United States, to the legal claims of my clients.

SITGREAVES, J. This is an action of debt, brought by the plaintiffs, to recover of the defendant, on an obligation made in the year 1776. The defendant has pleaded four several pleas in bar, which are now for the decision of the court by demurrer.

I shall consider of the case, as it appears by the first plea, which places the defendant, on the most advantageous ground: as a decision on that will probably govern all the cases arising out of the subsequent pleas.

The case as it appears by the first plea, is as follows: the plaintiffs were merchants, residents of North Carolina, before and at the time of the declaration of independence. By an act of the legislature of North-Carolina, passed in April 1777, it was among other things enacted, "that all persons, being subjects of this state, and now living therein, or who shall hereafter come to live therein, who have traded immediately to Great-Britain or Ireland, within ten years last past, in their own right, or acted as factors, store-keepers or agents here, or in any of the United States of America, for merchants residing in Great-Britain or Ireland, shall take an oath of abjuration and allegiance, or depart out of the state." By the same act, such persons were permitted to sell their estates, to export the amount thereof in produce, and to appoint attorneys to sell and dispose of their estates for their use and benefit. The plaintiffs, falling within the description of persons contemplated by this act, and refusing to take the oath, departed the state: the debt which is the subject of the present suit then existing. By subsequent acts of the legislature, all the estates, rights, properties and debts of certain persons, among which the plaintiffs are specially named, are declared to be confiscated: and the debts due to such

persons are directed to be paid to certain commissioners, to be appointed by the county courts for that purpose, by all persons within the state, owing the same, under pain of imprisonment: which payment it is declared shall forever indemnify and acquit the persons paying the same, their heirs, &c. against any future claim for the money mentioned in the receipts or discharges of such commissioners. In obedience to those acts, the defendant paid the debt in question, to the commissioners authorized to receive it, and relies on that payment as legal, and a full and sufficient discharge. The plaintiffs, admitting the fact of payment, rely on the construction of the treaty of peace; the law of the state declaring that treaty to be part of the law of the land; and the constitution of the United States. The counsel for the plaintiffs, in support of their claim, has in the course of his argument, presented to the view, a doubt whether the debt in the present question has been confiscated in a strictly legal sense, by any of the acts called *confiscation acts*? and has urged that doubt strenuously, and with much force of argument: contemplating them as a body of penal law, and of course subject to the legal rules of construction in such cases. The observations on that point would merit much attention; but I deem it not absolutely necessary to investigate that question, in forming an opinion upon the present case: and shall confine my observations solely to the law and the facts, as they arise out of the pleadings, in the first plea of the defendant, which admits alone of this question, *viz.*

Are the plaintiffs barred of a recovery?

It would appear quite unnecessary, to enquire whether congress, under whose authority the treaty was negotiated, was vested by the states with a power competent to enter into such a contract, had not part of the arguments of the defendant's counsel seemed to require it. No one will doubt, if they had the power, the treaty consequently became obligatory on the people of the United States, when made and duly ratified.

Whatever agreement the states may have entered into, at the declaration of independence, and to what purposes and extent that agreement may or may not have bound them, as a confederated body; it is clear that at a subsequent period, and previous to the negotiation of this treaty, they, by their delegates in congress, formed and entered into a solemn compact, by which they plight and engage the faith of their constituents, to abide by the determination of the United States in congress assembled, on all questions which by the confederation, are submitted to them; and that the articles thereof, shall be *inviolably* observed by the states. Among many other portions of sovereignty which the states thought proper to deposit in that confederated head, was the *sole and exclusive* right and power of determining on *peace and war*, (except in certain cases specially enumerated) of sending and receiving ambassadors, entering into *treaties* and alliances. No words can be more comprehensive or express, relative to the point in question: nor is there of-

ferred to my mind the least room for doubt. Admitting for a moment's sake what has been contended, that the ministers, who negotiated the treaty, exceeded the powers granted them, certain the ratification of that instrument, by congress confirmed and legalized all that had been done by them; and if it could be supposed as has been said, that congress in the ratification of it, exceeded the powers vested in them by the state, the act of Assembly of that state, passed in 1787, must have extinguished every scintilla of doubt, as to its validity and obligatory force on their citizens. That act is a perfect recognition of the whole treaty, declares it to be part of the law of the land, and directs the Judges to decide accordingly. The last mentioned act must surely be sufficient to satisfy the mind of the most scrupulous and sceptical. For myself, I do not hesitate to declare, that it adds nothing to the validity or legality of the treaty; that its ratification by congress was alone sufficient, and that the act of Assembly of the state was superfluous.

The counsel for the defendant has contended that, by the operation of the acts of confiscation, and the payment into the treasury, the plaintiffs were wholly divested of their right; and the same, if existing at all, was vested in the state. This forms a material part of his defence, and if it had been clearly evinced, that the right of the plaintiffs was wholly extinguished, by the operation of the confiscation acts, and could not possibly be revived or restored, by any subsequent act of the state, or the nation, it would follow of course, that they could have no demand against the defendant. In support of this argument, it is said, 4 *Bacon*, 637, that all acts done under a statute while in force, are good notwithstanding a subsequent repeal. I am ready to admit the principle in its fullest extent, in the exposition of a statute or municipal law of any particular state. It is consonant with reason, and is justified by the necessity of the case; it prevents much confusion and embarrassment and insures a ready submission to the laws, by a confidence in the security impliedly promised to such obedience. If the treaty was now to be considered as an act of the state, and emanating from the same authority only that produced the acts of confiscation, this reasoning might be solid. But that instrument cannot be subject to the ordinary rules of construction, which govern the exposition of statutes of a particular state. These have for their object, the regulation of the rights of a distinct community or society only, whose interests being similar, are equally affected by an uniform regulation of their rights; who are alike united by the allegiance due to, and protection from, the same government; that is a compact formed between two separate and distinct nations, relative to certain specified subjects which involve interests of their respective citizens or people, unavoidably clashing with each other.

The one is an act of a state, but a component part of the nation, providing for the benefit of its own citizens. The other a compact of the whole nation (of which that state is but a part) with another

nation, which must necessarily controul all acts issuing from the inferior authority which might contravene it. This is evinced by that plain and strong expression in the constitution of the United States, which declares, "that all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the Judges in every state shall be bound thereby, any thing in the constitution or laws of any state, to the contrary notwithstanding." Taking it for granted then, that the treaty is not to be governed, when in opposition to particular laws, by the rigid rules of the common law; nor to be restrained in its operation, by any statute of any particular state, but that "it ought to be interpreted in such manner as that it may have its effect, and not be found vain and illusive," I will proceed to consider of the operation of the 4th article.

Art. 4th. "It is agreed that creditors on *either side* shall meet with no lawful impediment to the recovery of the full value in *sterling* money of all *bona fide* debts heretofore contracted."

This article appears to me so clear, precise and definite, that one would be at some loss to select other words to render it more so. But it has been contended by the defendant's counsel that, by a true construction of this article, it will appear much less general than the expressions would warrant; that it is a provision for real British subjects only, that is, persons resident in Great-Britain at the commencement of the war; a term used in contradistinction to many other descriptions of people, who in the course of the war, took part with that nation, and that this construction is justified by the term *sterling money*. In order to support this exposition, a reference has been had to the 5th and 6th articles.

The 4th art. contains the only stipulation with respect to debts. In the whole instrument it is mutual and general in its expression; not limited or restrained by any particular words, to any description of persons, as is evident in the 5th art. If that had been in the contemplation of the parties, they could not have overlooked the necessity for these distinctions; nor are we at liberty to presume it. In the next article, the distinction is made with great accuracy, with regard to those who may endeavour to procure a restitution of their lands and other property. With respect to the expression *sterling money*, it appears to me that was probably concluded on as a standard, whereby to estimate the value of money due; it being no doubt, apprehended that a depreciated paper medium circulated in many states of the union, the nominal sum in which might not produce the intrinsic value of the debt due.

Another construction has been placed on this article, equally, in my opinion, unfounded, with the foregoing. It has been said, the article was only intended to take off from British subjects their disability as alien enemies to sue. Every one knows that disability

*Vattel, 382.

can only exist during the continuance of a war, it would have been therefore unnecessary to provide for it in a treaty of peace; when it is obvious, the peace itself, agreeably to the long established principles of law, removed all such disability without any special stipulation. The word *recovery* admits not of such an idea. The words *lose* and *recover* have very different import, in practice. The difference is daily exemplified in our courts, and the distinction appears evident, in the body of that instrument; in the latter part of the 5th article, it is stipulated that, certain persons shall meet with no lawful impediment in the prosecution of their just rights. In the 4th art. the words are, no lawful impediment to the recovery of their debts. The distinction is obvious, and the terms apply applied in each case. In the former relative to lands and other property, which had been confiscated, and a restoration of which entirely depended on the liberality of the legislatures, the term *recovery* would have been improper; in the latter, in which a payment to the creditor was positively stipulated, the expression is correct.

Kent says, p. 369, "when an act is conceived in clear and precise terms; when the sense is manifest, and leads to nothing absurd; there can be no reason to refuse the sense which this treaty naturally presents, to go elsewhere in search of conjectures in order to extinguish or restrain it, is to endeavour to elude it."

It is therefore my opinion, that this article does controul the operation of the acts of confiscation, relative to debts; that the plaintiffs in this case, are entitled to recover on the first demurrer; the plea in that case being the strongest ground of defence made by the defendant; that therefore judgment be given for the plaintiffs, on each of the demurrers.

The state, who has compelled the payment from the creditor, by a threat of severe punishment, will certainly feel bound by every principle of moral obligation to reimburse, in the most ample manner, all those who have made such payments. In addition to the moral tie that it is bound by, a solemn promise so to do is clearly expressed by an act of the legislature.

I have only to observe, that I have considered this case as of the utmost importance; that I have given it all the attention and consideration in my power to bestow at this time and place; that if my opinion is founded in error, which is possibly the case, happily for the defendant, there is a higher tribunal where the error may be corrected.

BELSWORTH, C. J. It is admitted that the bond on which this suit is brought, was executed by the defendant to the plaintiffs; and that the plaintiffs have not been paid. But the defendant pleads, that since the execution of the bond, a war has existed, in which the plaintiffs were enemies; and that during the war, this debt was confiscated, and the money paid into the treasury of the state. And the plaintiffs reply, that by the treaty which terminated the

war, it was stipulated, that "creditors on either side, should meet with no lawful impediment, to the recovery of *bona fide* debts heretofore contracted."

Debts contracted to an alien, are not extinguished by the intervention of a war with his nation. His remedy is suspended while the war lasts, because it would be dangerous to admit him into the country, or to correspond with agents in it; and also because a transfer of treasure from the country to his nation, would diminish the ability of the former, and increase that of the latter, to prosecute the war. But with the termination of hostilities, these reasons and the suspension of the remedy cease.

As to the confiscation here alledged, it is doubtless true, that enemy's debts, so far as consists in barring the creditor, and compelling payment from the debtors for the use of the public, can be confiscated; and that on principles of equity, though perhaps not of policy, they may be. For their confiscation as well as that of property of any kind, may serve as an indemnity for the expences of war, and as a security against future aggression. That such confiscations have fallen into disuse, has resulted not from the duty which one nation, independent of treaties, owes to another, but from commercial policy, which European nations have found a common, and indeed a strong interest in supporting. Civil war, which terminates in a severance of empire, does perhaps less than any other, justify the confiscation of debts; because of the special relation and confidence subsisting, at the time they were contracted, and it may have been owing to this consideration, as well as others, that the American States, in the late revolution, so generally forbore to confiscate the debts of British subjects. In Virginia, they were only sequestered; in South-Carolina, all debts to whomsoever due were excepted from confiscation; as were in Georgia, those of "British merchants, and others residing in Great-Britain." And in the other States, except this, I do not recollect that British debts were touched. Certain it is that the recommendation of congress on the subject of confiscation, did not extend to them. North-Carolina, however, judging for herself, in a moment of severe pressure, exercised the sovereign power of passing an act of confiscation, which extended, among others, to the debts of the plaintiffs. Providing, however, at the same time, as to all debts which should be paid into the treasury under that act, that the state would indemnify the debtors, should they be obliged to pay again.

Allowing then that the debt in question was in fact and of right confiscated; can the plaintiffs recover by the treaty of 1783?

The 4th article of that treaty is in the following words, "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all *bona fide* debts heretofore contracted."

There is no doubt but the debt in question was a "*bona fide*" debt, and theretofore contracted, *i. e.* prior to the treaty. To bring it

within the article, it is also requisite that the debtor and creditor should have been on different sides, with reference to the parties to the treaty, and as the defendant was confessedly a citizen of the United States, it must appear that the plaintiffs were subjects of the King of Great-Britain; and it is pretty clear, from the pleadings and the laws of the state, that they were so. It is true that on the 4th of July 1776, when North-Carolina became an independent state, they were inhabitants thereof, though natives of Great-Britain; and they might have been claimed and holden as citizens, whatever were their sentiments or inclinations. But the state afterwards in 1777, liberally gave to them with others similarly circumstanced, the option of taking an oath of allegiance, or of departing the state under a prohibition to return, with the indulgence of a time to sell their estates, and collect and remove their effects. They chose the latter; and ever after adhered to the king of Great-Britain, and must therefore be regarded as on the British side.

It is also pertinent to the enquiry, whether the debt in question be within the before recited article, to notice an objection which has been stated by the defendant's counsel, *viz.* that at the date of the treaty, what is now sued for as a debt, was not a debt, but a nonentity; payment having been made, and a discharge effected, under the act of confiscation; and therefore that the stipulation concerning debts did not reach it.

In the first place, it is not true that in this case, there was no debt at the date of the treaty. A debt is created by contract, and exists till the contract is performed. Legislative interference, to exonerate a debtor from the performance of his contract, whether upon or without conditions, or to take from the creditor the protection of law, does not in strictness, destroy the debt, though it may, locally, the remedy for it. The debt remains, and in a foreign country, payment is frequently enforced.

Secondly, it was manifestly the design of the stipulation, that where debts had been *therefore contracted*, there should be no bar to their recovery, from the operation of laws passed subsequent to the contracts. And to adopt a narrower construction, would be to leave creditors to a harder fate than they have been left to, by any modern treaty.

Upon a view then of all the circumstances of this case, it must be considered as one within the stipulation, that there should be "no lawful impediment to a recovery." And it is not to be doubted, that impediments created by the act of confiscation, are *lawful* impediments. They must therefore be disregarded, if the treaty is a rule of decision. Whether it is so or not, remains to be considered.

Here it is contended by the defendant's counsel, that the confiscation act has not been repealed by the state;—that the treaty could not repeal or annul it; and therefore that it remains in force, and secures the defendant. And further, that a repeal of it would not take from him a right vested, to stand discharged.

As to the opinion, that a treaty does not annul a statute, so far as there is an interference, it is unsound. A statute is a declaration of the public will, and of high authority; but it is controulable by the public will subsequently declared. Hence the maxim, that when two statutes are opposed to each other, the latter abrogates the former. Nor is it material, as to the effect of the public will, what organ it is declared by, provided it be an organ constitutionally authorized to make the declaration. A treaty when it is in fact made, is, with regard to each nation that is a party to it, a national act, an expression of the national will, as much so as a statute can be. And it does, therefore, of necessity, annul any prior statute, so far as there is an interference. The supposition that the public can have two wills at the same time, repugnant to each other, one expressed by a statute, and another by a treaty, is absurd.

The treaty now under consideration was made, on the part of the United States, by a congress composed of deputies from each state, to whom were delegated by the articles of confederation, expressly, "the sole and exclusive right and power of entering into treaties and alliances;" and being ratified and made by them, it became a complete national act, and the act and law of every state.

If however, a subsequent sanction of this state was at all necessary to make the treaty law here, it has been had and repeated. By a statute passed in 1787, the treaty was declared to be law in this state, and the courts of law and equity were enjoined to govern their decisions accordingly. And in 1789, was adopted here the present constitution of the United States, which declared, that all treaties made, or which should be made, under the authority of the United States, should be the supreme law of the land; and that the Judges in every state should be bound thereby; any thing in the constitution or laws of any state to the contrary notwithstanding. Surely then, the treaty is now law in this state; and the confiscation act, so far as the treaty interferes with it, is annulled.

Still it is urged, that annulling the confiscation act, cannot annul the defendant's right of discharge, acquired while the act was in force. It is true, that the repeal of a law does not make void what has been well done under it. But it is also true, admitting the right here claimed by the defendant, to be as substantial as a right of property can be, that he may be deprived of it, if the treaty so requires. It is justifiable and frequent, in the adjustment of national differences, to concede for the safety of the state, the rights of individuals. And they are afterwards indemnified or not, according to circumstances. What is most material to be here noted is, that the right or obstacle in question, whatever it may amount to, has been created by law, and not by the creditors. It comes within the description of "lawful impediments;" all of which, in this case, the treaty, as I apprehend, removes.

LET JUDGMENT BE FOR THE PLAINTIFFS.

L

June Term, 1791.

GUION vs. M'CULLOUGH, et al.

ACTION on a bond. The writ was filled up, "*shewing a power unto him of a plea of debt of 1000 dollars,*" (the party of the bond): plea in abatement, because the writ did not run in usual form, "*in the debt and detinet:*" general demurrer.

Graham, for the plaintiff. Slade, for defendant.

IREDELL, J. and SITGREAVES, J. notwithstanding the point authority produced by Slade, overruled the plea. They held the writ was deemed sufficient, because it agreed with the *accrue* clauses, inserted in actions of debt, in the bill of Middlesex, according to the English practice.

June Term, 1792.

PALYART vs. GOULDING.

THE defendant and his two brothers carried on business as merchants, in the state of Maryland, under the firm of *John Goulding, and brothers*, and in the year 1791, gave the plaintiff the promissory note, on which this action was brought, for a debt of the said partnership, signed *John Goulding, & Brothers*, the stile of the firm. The defendant (being the only partner in this state) was sued alone: he pleaded in abatement to the action, that this contract was entered into, in the state of Maryland, and that the other partners who were living, and not named, ought to be made defendants. To this plea there was a general demurrer.

Graham, in support of the demurrer, relied wholly on the fifth section of the act of Assembly of this state. 1789, 57, 688.

Woods and Martin, contended that this case came within the rule of *lex loci*, and that to allow this act the operation insisted on for the plaintiff, would substantially alter the contract.

But PATTERSON, J. took a distinction between the contract and the remedy: and observed, that the contract remained the same notwithstanding this act: and that the remedy only was extended

And SITGREAVES, J. *accordante*:

A respondeas oster was awarded.

June Term, 1792.

UNITED STATES vs. MAUNIER.

MURDER on the high seas... Mr. Attorney of the U. S. *Hill*, offered to give in evidence, the examination of the prisoner, before his commitment.

Martin, for the prisoner, objected to this :

1. Because the prisoner at the time of his examination, was under *impressions of fear*.
2. Because the examination was *not subscribed by the prisoner*.

I. The prisoner was a French sailor : and the murder with which he stood charged, had been committed upon the high seas : on his landing in North-Carolina, he was taken up and committed to jail ; from thence he was taken on the next day, brought into court in irons, and examined, without being informed that he was then under an examination, and not on his trial. He understood not the English language, and no one informed him of what was passing. There was room to believe that he thought when he was remanded to jail, that he had been tried, convicted and condemned. For he asked a person who understood the French language, on what day he was to be executed.

The counsel said, altho' in the case of a person who had resided some time in this country, or in others in which the proceedings are carried on by a jury, the objection would be frivolous ; yet it must have weight in the case of a foreigner, unacquainted with our laws and our language. That what the prisoner had seen in court, except perhaps the confrontation of witnesses, was all that in similar circumstances, he would have seen in his country, had he been tried there, where sentence of death is not pronounced in court in presence of the prisoner, but read to him, afterwards by the clerk, in the dungeon.

II. The examination and confession *subscribed by an offender*, before a Justice of the peace, is good and sufficient evidence against such offender. *Gilb. L. E.* 140.

The examination of *Sterne* and *Borofski*, by the Chief Justice, was refused to be read at their trial. See *St. Tr. Vol. III. p. 470*. And serjeant *Wilkey*, in his edition of *Hales' pleas of the Crown, Vol. II. p. 585, in notis*, adds a quære, whether the Chief Justice was not right in such refusal ? For by the opinion of some judges now living, the statute does not extend to the examination of the party accused, *unless he signed his examination*, but only to the witnesses or persons accusing.

In *Vaughan's* case, Mr. *Cranley* having made oath, that the exami-

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nation was taken before Sir *Charles Hedges* and signed by the
er, it was read. 5 *St. Tr.* 229.

In *Harrison's* case, the Attorney General desired that the
dant's examination taken before the Lord Chief Justice *Ba*
might be read, and the defendant having *acknowledged the*
be his, that was subscribed to it, it was read accordingly.
Tr. 118.

In *Laver's* case the prisoner's counsel said, and the Chief
granted that his examination could not be read, unless it was
by him. 8 *St. Tr.* 474. 8 *Mod.* 89.

PATTERSON, J. thought the examination ought to have been
ed by the prisoner.

SITGREAVES, J. said the first objection had much weight
him, and

Mr. Attorney of the U. S. withdrew his motion.

The prisoner was found guilty upon other evidence.

And it was moved in arrest of judgment, on the ground that
length and depth of the wound were not mentioned in the
ment.

The prisoner's counsel cited 4 *Co.* 42. *Haydon's case*.

The Court did not intimate that they had any doubt, but
they had they would direct a copy of the indictment and read
be transmitted to the Supreme Court.

CURIA ADVISARE VULT

The Court directed the prisoner to be arraigned on another
dictment, which had been found against him.

Whereupon he pleaded *not guilty*, and the Court ordered the
al to be proceeded on instantly:

And with some difficulty was prevailed on to adjourn it to
succeeding Monday, it being Saturday.

An order was then made, that the Marshall send expresses to
grand jury (who had been discharged) commanding their im
ate return.

On the Monday following, the prisoner was brought to the
as he and his counsel expected, to be tried on the second indictm
But the Court informed the bar, they would take up the m
in arrest of judgment.

the part of the United States, several precedents of indictments were read out of *West*, in which the length and depth of the wound are not mentioned,

Artin observed, that in all the indictments, (but one,) in which length and depth of the wound were not mentioned, the instrument had gone through the body of the person killed, some limb had been cut off, or the wound had been given with a blunt weapon—in this case the mortal wound was stated to have been given with a knife, on the head—That the authority in *Coke*, was not only taken, but frequently recognized.

The Court however overruled the motion, without making any reservation, and passed

SENTENCE OF DEATH.

* At the same time sentence was passed on three other men who had been included in the same indictment: and they were soon after executed. This is the first time that judgment of death was given under the authority of the United States.

November Term, 1796.

JONES vs. NEALE & BLOUNT.

DEBT on bond. To prove the execution of the bond, the plaintiff's counsel offered a deposition of the subscribing witness, who resided at Newbern, about 130 miles from Raleigh. It appeared that the witness had been subpoenaed by the plaintiff, but did not attend, and that he was at home in good health.

The deposition was offered as one taken in pursuance of the 30th Section of the act of Congress, entitled, "*An act to establish the Judicial Courts of the United States*:" approved the 24th September 1789; which provides for the taking depositions *de bene esse* in certain cases; one of which is where the witness shall live at a greater distance from the place of trial than 100 miles.

Two objections were made by the defendant's counsel to the reading this deposition.

1. That it was taken *de bene esse* only, and therefore could not be read, unless the party offering it, first proved that the personal attendance of the witness could not be obtained. But here it appeared that he was within reach of the process of the court, and in sufficient health to attend.

2. That the certificate of the Magistrate, who took the deposition, did not set forth the reasons of taking it, which is made necessary by the act of Congress.

To the first objection it was answered by the plaintiff's counsel that the manifest intention of the act, is, that those circumstances which authorise the taking of a deposition *de bene esse*, should if they exist at the time of trial, entitle it to be read. That the residence of the witness at a greater distance from the place of trial than 10 miles is, by the act, placed on the same footing with his age, infirmity, going to sea, &c. and is equally a good cause for taking a deposition *de bene esse*. But the age or infirmity of a witness, without doubt excuse his non-attendance, and entitle his deposition to be read: and there is good ground to infer the same of his residence at a greater distance from the place of trial than 100 miles.

This construction is greatly corroborated by that clause of the act, which defines the evidence admissible on appeals: but if a contrary construction should prevail, it appeared that the plaintiff had caused the witness to be subpoenaed, which was all that could be required to enforce his attendance, and if that proved ineffective, the deposition ought to be read.

To the 2d objection:—that the act of Congress requires the Magistrate taking a deposition, to certify the reasons of taking it, in order to save the party at whose instance it is taken, the trouble and expence of bringing witnesses from a great distance, to prove the age, infirmity, &c. of the witness examined: but it left the party at liberty to incur this trouble and expence if he thought proper: as in taking depositions under commissions, issued from the state courts of this state, the party at whose instance the deposition is taken, may procure the commissioner to certify that notice of the time and place of caption was given to the adverse party; and such certificate is received by the court as conclusive evidence, as to that point: but if the commissioner fail to certify, the party must establish the fact.

By the Court, PATTERSON, J. and SITGREAVES, J. It appears to be the true construction of the act of Congress, that those circumstances which will warrant the taking of a deposition *de bene esse* should, if they exist at the time of trial, authorize the reading of it. But as this act is made in derogation of the common law it must be strictly construed, and literally observed. To fail in one iota of the ceremonies prescribed by it is to fail in the whole.

The act requires that the deposition shall be retained by the Magistrate taking it until he deliver the same with his own hand, into the court for which it is taken, or shall, together with the reasons of its being taken, and of notice, &c. be by him sealed up and directed to such court. This part of the act has not been observed, therefore the deposition cannot be read.

Badger and Taylor, for the Plaintiff. Woods, for the Defendant.

ember Term, 1795.

IN EQUITY. 83

BOND *versus* ALLEN & OTHERS, EXR's. &c.

An exception taken to the defendant's plea, grounded on the 4th section of 1789, 23, 677, respecting the limitation of time, for bringing suit against administrators and executors.

The Court, PATTERSON, J. and SITGREAVES, J. held that the said 5th sections of that act must be taken together: that the defendant ought to have entitled himself to the benefit of the 4th section by shewing he had complied with the requisites in the 5th: as this was not set forth,

THE PLEA WAS OVERRULED,

Baker, for the complainant. *Baker*, for the defendant.



M
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1. The Superior Court will not dismiss an appeal, which the appellant has failed to bring up, unless they have the transcript before them. *Watson vs. Wright,* 21.
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See DEBT, 3.

ATTACHMENT.

See GARNISHEE.

BOOK DEBT.

1. Defendant may prove his *sett off* as a book debt. *Thomeguex vs. Bell,* 44.
2. Work done by slaves may be proved as a book debt. *Mitchell vs. Clarke,* 25.

3. Attorney's bill, proved as a book debt. *Charlton's Ex. vs. Lowry's ex'r.* 21.

BRITISH DEBTS,

Tho' compulsorily paid into the Treasury, under an act of Assembly, may be sued for and recovered. *Hamiltons vs. Eaton*, *77.

CAPIAS AD RESPONDENDUM

Altered on motion from case to covenant. *Simpson vs. Crawford*, 56.

COMMISSIONS

To issue in all cases *de bene esse*, when the witness resides in the state, and absolute if he resides without. *Regula Generalis*, 61.

CONFISCATED PROPERTY.

Clary vs. Wrenford, 57.

COSTS.

In bills to perpetuate testimony, if defendant does not defend, no Solicitor's fee to be allowed him. *Coor's Ex. vs. Page*, 56.

COVENANT.

1. On a sealed note for delivery of specific articles, a demand must be proved. *Armistead vs. Abbalson*, 23.

DEBT, action of

1. Is the only one that can be maintained on a sealed instrument unattested by a subscribing witness. *Ingram vs. Hall*, 1.
2. Proof of the obligor's hand writing admitted, *id.* 1.
3. Is not within the purview of 1785. 2, 548. in case of appeal. *Barrow's Ex'r. vs. Baker*, 19.

DEED,

1. Conveying an estate, with an exception of the grantor's life time in the premises, is good; but the exception is void. *Ward vs. Ward*, 28.

DEMAND.

See COVENANT.

DEPOSITION.

1. Notice may be given to the Attorney, when the party is out of the State. *Savage's Ex'r. vs. Rice*, 20.
2. Coming up with a record to be read, on proof made of their being read below. *Kaighn & Attmore vs. Kennedy*, 37.
See COMMISSIONS and WITNESS, 2, & 7.
3. Refused to be read, because the commissioner had not certified the reason of its being taken. *78.

DEPRECIATION

Allowed on a bill drawn on Philadelphia. *Morris & Allison vs. Stokes*, 20.

DETINUE, action of

1. Plaintiff shall have judgment, tho' the negro for which it was bought, died, since the demand. *Skinner vs. Hargrove*, 74.
2. Or the thing returned. *Merrit's Ex'r. vs. Merrit*, 18.

SET OFF.

Those words written on the docket, considered as a plea. *See Ex'r. vs. Green,*
Tho' barred by the statute of limitation, admitted, if the plea not replied. *Same case.*

SHERIFF.

Not entitled to fees for service, which do not appear of record have been performed. *More vs. Her.*

SLAVES.

Increase of, the property of the particular tenant. *Times vs. Her,*

See WITNESS, 3 & 4.

SURVEYOR.

His allowance (and that of special jurors) on the premises, and court. *Sheppard vs. Taylor,*

See GRANT OF LAND.

TREATY,

May deprive individuals from their rights. *Hamilton vs. Eaton, 77.*

TRESPASS ON THE CASE

1. Does not lie on a sealed note, which cannot be proved as a deed. *Ingram vs. Hall,*

TRESPASS Q. C. F.

1. Plaintiff's licence given in evidence, on the plea of the General Issue. *Cox vs. Dove,*

WITNESS.

1. Sworn, tho' he claimed property situated like that in dispute. *Fennell vs. Perry,*
2. Residing out of the state, his deposition read though he had been served with a subpoena before he left it. *Meredith vs. Kent's Ex'r.*
3. Whether a slave be an admissible witness against a free negro. *State vs. George.*
4. The same question determined in the negative. *Cox vs. Dove,*
5. Hand writing of the subscribing witness proved, tho' he had become plaintiff in the suit. *Ellis' adm'r. vs. Hetfield,*
6. Witness being accidentally out of the state, proof of his hand writing rejected. *Harvey vs. Jones & Barfield,*
7. Witness' deposition refused to be read on the party's affidavit of the sickness. *Willis vs. Brown's Ex'r.*
8. Subscribing witness' hand, not admitted to be proved, he residing in the state, on affidavit that he was sick in New-York, and his life despaired of, when he was last heard of. *Gordon's vs. Payne & Maire,*
9. Holding negroes under the same title as the defendant rejected. *Starky's Ex'r. vs. M'Clure.*

T H E E N D.

GRAND JURY.

Recalled after being discharged. *U. S. vs. Mannier.*

28.

GRANT OF LAND.

The mistake of a Surveyor or Secretary of State, shall not prejudice the grantee. *Person vs. Roundtree,*

18.

INDICTMENT.

1. Whether the omission of the word *vi et armis* be aided by the statute? *State vs. Adams,* 33.
2. Ought expressly to shew the county in which the offence was committed, to be within the jurisdiction of the Court. *Same case.*

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Discharged from custody in a civil suit, on motion. *Henry vs. Smith,* 56.

INTEREST.

Allowable, tho' not claimed in the declaration on an open account.

Kaighn & Attmore vs. Kennedy,

37.

JUROR

1. Who tried the cause below, not to try it on an appeal. *Kaighn & Attmore vs. Kennedy,* 37.
2. On discovery of it, suit continued, and a new juror refused to be sworn. *Same case.*

MANSLAUGHTER.

Person convicted of, bailed, and judgment deferred. *State vs. Smith,*

54.

NEW TRIAL

Granted after a nonsuit voluntarily suffered, on affidavit that a witness by whom plaintiff expected to have repelled the plea of the Statute of Limitation, had withdrawn himself just before the trial, on payment of full costs. *Sheppard vs. Salter,*

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NOTE FOR SPECIFIC ARTICLES.

1. Considered by WILLIAMS, J. as for so much money. *Surv. partner of Stanley & Green vs. Cummins,* 21.
2. Jury at liberty to allow the difference in the value of money. *Same case.*
3. Not negotiable, *Hodges vs. Clinton.* 76.

POSSESSION.

How far good evidence of a fee. *Willis vs. Smith,*

21.

RACE.

Party winning it, may have his action against the stake-holder.

Williams vs. Cabarrus,

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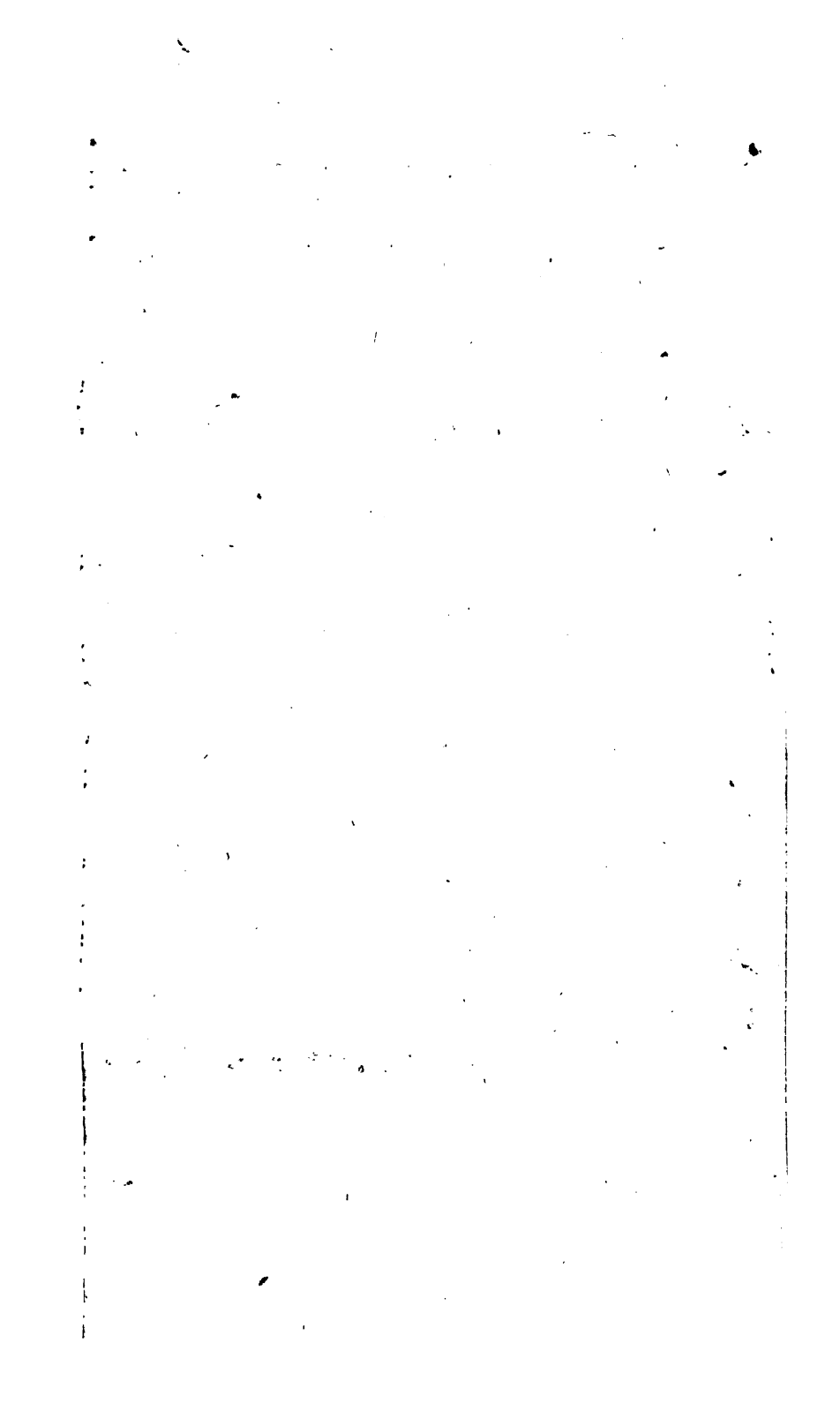
SALVAGE.

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SEALED NOTE,

1. Not to be given in evidence in an action on the note. *Ingram vs. Hall, Colbardi vs. Stanton.* 1, 22.
2. Without a witness, proved by evidence of the obligor's handwriting. *Ingram vs. Hall, Tullock vs. Nichols & Farmer.* 1, 27.





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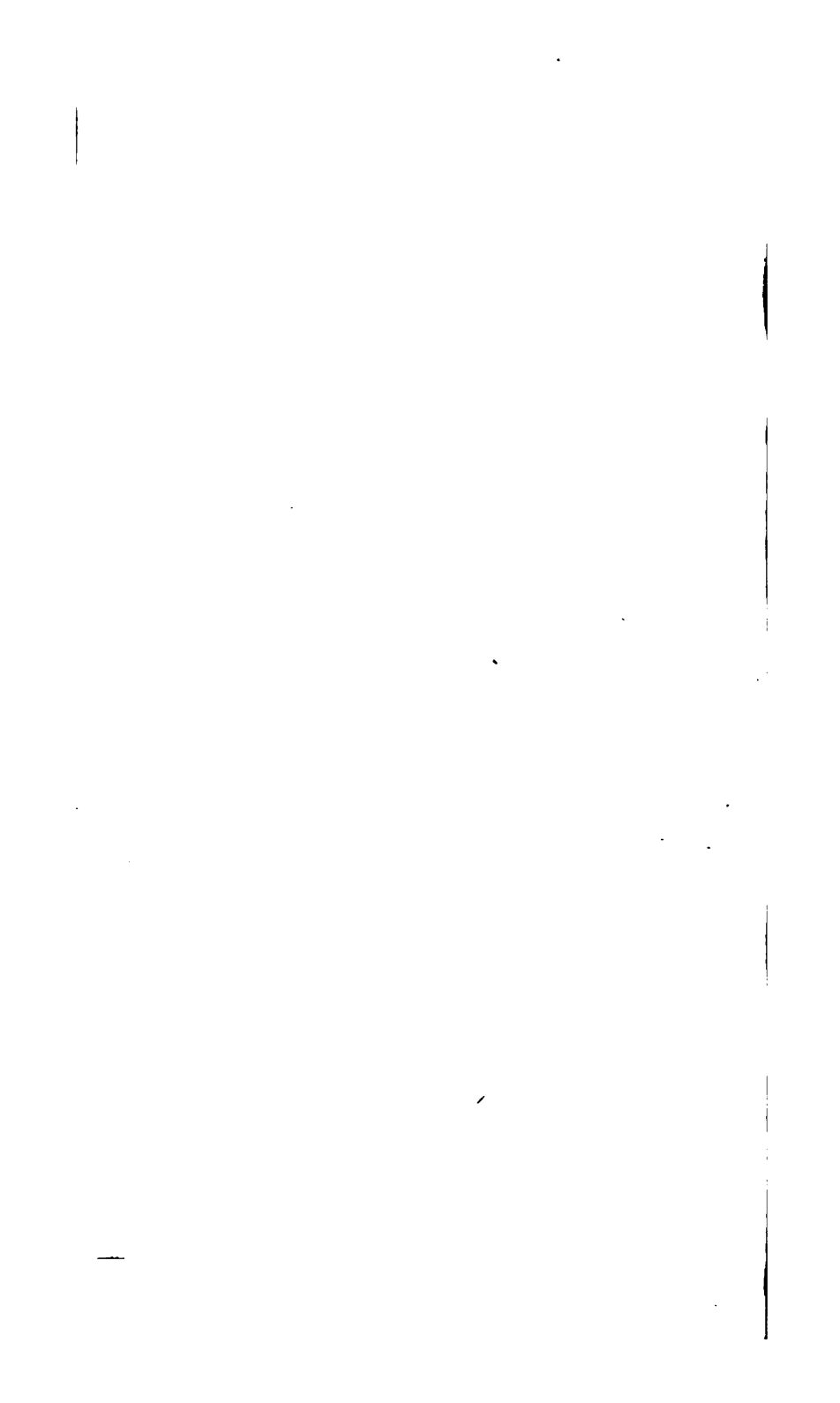
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